Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONERS

v.

SANDRA L. CRAFT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-1734, 99-1737

SANDRA L. CRAFT, PLAINTIFF-APPELLEE/
CROSS-APPELLANT

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE
COMMISSIONER OF INTERNAL REVENUE,
DEFENDANT-APPELLANT/CROSS-APPELLEE

Appeal from the United States District Court for the
Western District of Michigan at Grand Rapids
No. 93-00306-Gordon J. Quist, District Judge

Argued: August 10, 2000

Decided and Filed: November 22, 2000

Before: KEITH, COLE, and GILMAN, Circuit Judges

OPINION

COLE, Circuit Judge.

This case is before us for the second time. In *Craft v. United States*, 140 F.3d 638 (6th Cir. 1998) (hereinafter, "*Craft I*"), we held that a federal tax lien against Plaintiff-Appellee Sandra L. Craft's now-deceased hus-

band, Don, did not attach to property held by the couple in a "tenancy by the entirety" under Michigan law. On remand, the district court found that Defendant-Appellant the United States of America ("IRS," or "the government") was nonetheless entitled to $6,693 with which Don had fraudulently enhanced the entireties property. Now, the IRS appeals the district court's judgment on the basis that the *Craft I* panel misconstrued the law. Sandra responds that the IRS is precluded from raising this argument on appeal by the "law of the case" doctrine and other principles. Sandra also raises a number of claims in a cross-appeal. For the following reasons, we **DISMISS** the IRS's effort to overturn *Craft I* as precluded by both the law of the case doctrine and the rule that one panel of this court may not overrule the prior decision of another panel. We **AFFIRM** the decision of the district court regarding Sandra's claims.

I. BACKGROUND

The essential facts of the case are as follows.[1] In May 1972, Sandra Craft and her husband, Don, purchased real property (known as the "Berwyck Property," for the road on which it was located) in Michigan as tenants by the entirety. *Craft I*, 140 F.3d at 639. Don failed to file federal income tax returns for tax years 1979 through 1986, and, in July 1988, the IRS assessed $482,446.73 against him in unpaid tax liabilities. *Id.* Don failed to pay his tax debts, and the IRS filed a notice of federal tax lien in March 1989 against all of Don's property and rights to property. *Id.*; *see also*

[1] *Craft I* contains a detailed factual and procedural background of this case. *See* 140 F.3d at 639-41.

I.R.C. § 6321. Don was insolvent during the period from April 1980 through August 1989.

On August 28, 1989, Don and Sandra transferred the Berwyck Property to Sandra by way of a quitclaim deed, in exchange for one dollar. *Craft I*, 140 F.3d at 639. In June 1992, Sandra sold the property to a third party for $119,888.20. *Id.* at 640. Pursuant to an agreement between Sandra and the IRS, Sandra kept half of the proceeds ($59,944.10); the other half was placed in a non-interest-bearing escrow account, subject to the same right, title, and interest that the federal tax lien had on the property. *Id.* In April 1993, Sandra filed a complaint pursuant to 28 U.S.C. § 2410(a), seeking to quiet title to the proceeds in the escrow account. *Id.* In its answer, the government argued that it was entitled to half of the proceeds from Sandra's sale of the property because its lien attached to Don's interest in the Berwyck Property, even though Don and Sandra had held the property as tenants by the entirety. *Id.* The government also claimed that Don had fraudulently conveyed his interest in the property to Sandra. *Id.*

Both parties moved for summary judgment in September 1993. The district court denied Sandra's motion and granted the government's motion in September 1994. *See id.* at 640. The district court held that at the time of the August 1989 conveyance, Don and Sandra's entireties estate terminated and each spouse took an equal half interest in the estate. *Id.* Accordingly, the district court held that the federal tax lien attached to Don's interest at that time. *Id.* Upon Sandra's motion, the court conducted further proceedings to determine the value of Don's interest at the time of the termination of the tenancy by the entirety.

See id. After a telephonic hearing, the court found in October 1996 that the value of Don's property to which the IRS lien attached was $50,293.94.[2] *See id.* at 641. The court then ordered that the IRS receive that amount from the escrowed proceeds. *Id.*

On cross-appeals to this court, the *Craft I* panel reversed the district court's ruling, holding that "[b]ecause Michigan law does not recognize one spouse's separate interest in an entireties estate, a federal tax lien against one spouse cannot attach to property held by that spouse as an entireties estate." 140 F.3d at 643. The panel also held that, under Michigan law, "Don did not possess a separate future interest in the Berwyck Property; therefore, the federal tax lien could not attach to a future interest that did not exist under Michigan law." *Id.* at 644. After finding that Don had no present or future interest in the disputed property, the court remanded the case for determination of "whether a fraudulent conveyance occurred in this case." *Id.* at 644. Judge Ryan concurred in the majority's result, but argued that Don had a separate, future interest in the entireties property to which the tax lien might attach if the August 1989 transfer to Sandra were set aside as fraudulent. *See id.* at 649.

On remand, the district court conducted a bench trial. In written findings of fact and conclusions of law made in March 1999, the district court concluded that, although the transfer of the Berwyck Property to Sandra by quitclaim deed did not constitute a typical fraudu-

[2] The court reached the figure by dividing in half the difference between the fair market value of the property as of the date of the August 1989 transfer ($120,000) and the amount of the outstanding mortgage balance at the time ($19,412.12). *See Craft I*, 140 F.3d at 641.

lent conveyance under Michigan law, the government was entitled to relief under an exception to that law, *see McCaslin v. Schouten*, 294 Mich. 180, 292 N.W. 696, 699 (1940). The court found that under the exception, a creditor may obtain relief "where the debtor, while insolvent, places non-exempt funds beyond the reach of his creditors by enhancing the entireties property." *See id.* The court reasoned that from 1980 through 1985, while he was insolvent, Don and Sandra had used Don's funds to enhance the property by making a total of $6,693 in mortgage payments (excluding interest) on its behalf. The court found that Don's actions constituted a type of fraudulent conveyance under Michigan law, and that the government was entitled to recover the value of the mortgage payments ($6,693) plus interest (from the date of the court's October 1995 judgment) from the escrowed sales proceeds.[3] Sandra filed a motion to amend the judgment, arguing that the court should reverse its award of interest on the $6,693 it awarded to the IRS. Sandra also moved the court to award *her* interest, pursuant to 28 U.S.C. § 2411, on the funds that the IRS would have to return to her.[4] The court granted Sandra's motion in part, deleting the interest awarded to the IRS, but denied her request for interest.

The government filed a timely notice of appeal and Sandra filed a timely notice of cross-appeal in June

[3] The district court also rejected Sandra's theories to bar the government's relief. Sandra raises many of these theories on appeal, and we discuss them *infra*.

[4] The IRS was in possession of $50,293.94 of escrowed funds that the district court had awarded it in October 1995. Sandra was seeking interest on the $43,600.94 that the IRS would be returning to her (*i.e.*, 50,293.94 less $6,693).

1999. In October 1999, the government petitioned this court for en banc review of the *Craft I* decision. The government argued that the *Craft I* decision—as well *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971) (holding that federal government may not, under Michigan law, attach lien to entireties property to satisfy individual tax liability of one spouse), a prior decision upon which the *Craft I* court relied—conflicted with established, controlling precedent. This court rejected the petition in December 1999.

II. THE GOVERNMENT'S APPEAL

At this juncture, this case is not really about federal tax liens. Nor is it about state law property rights. This case is about the extent to which a prior decision of this court binds a subsequent panel when neither the facts, the parties, nor the law has changed. On appeal, the IRS reasserts its argument that a § 6321 federal tax lien against an individual taxpayer attaches to a tenancy by the entirety that the taxpayer shares, pursuant to Michigan law, with his spouse. This is, of course, the very argument we rejected in *Craft I*. For the reasons that follow, the government is precluded from re-arguing its case at this time.

A. Law of the Case

Under the law of the case doctrine, a court ought not reopen issues decided at an earlier point in the same litigation. *See Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L.Ed.2d 391 (1997). "Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case." *Hanover Ins. Co. v. American Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (citation and quotation marks omitted). Although the doctrine of law

of the case is "not an inexorable command," and courts must use "common sense" in applying it, *see id.*, the power of this court to reach a result inconsistent with a prior decision reached in the same case is "to be exercised very sparingly, and only under extraordinary conditions." *General Am. Life Ins. Co. v. Anderson*, 156 F.2d 615, 619 (6th Cir. 1946) (citation and quotation marks omitted). We have delineated three such extraordinary conditions in which we will reconsider a prior ruling in the same case: "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Hanover Ins. Co.*, 105 F.3d at 312. For the reasons that follow, the IRS fails to articulate the "extraordinary conditions" necessary for us to rehear the claims we have already rejected.

1. Clearly Erroneous and Manifest Injustice

The IRS looks first to the third exception, arguing that this court can revisit the issues decided by the *Craft I* panel because that panel's decision was clearly erroneous and would work a manifest injustice.[5] The government's argument is not persuasive because *Craft I* was not clearly erroneous.

The *Craft I* panel had before it circuit precedent that squarely addressed the issue before the court. In *Cole*,

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[5] The IRS points to *General Am. Life Ins. Co.* as an example of a case in which this court reconsidered its prior holding at a later stage in the same case. *See* 156 F.2d at 618-21. We do not dispute that we have the power to reach a result different from one reached earlier in the litigation; the government, however, has not met its burden in the instant case of showing the "extraordinary conditions" that will permit us to do so. *See id.* at 619.

this court held that a federal tax lien against a taxpayer did not attach to property owned by the taxpayer and his wife in a tenancy by the entirety. *See* 441 F.2d at 1343. Neither this court nor the Supreme Court has ever expressly overruled *Cole*. Nonetheless, the IRS contends that *Cole* has been effectively overruled by Supreme Court decisions subsequent to it. But no Supreme Court case has directly addressed the question before both the *Cole* and *Craft I* courts.[6] It is true that the Court has addressed the power of a federal tax lien to attach to state law property constructs other than a tenancy by the entirety, but the Court has done so only on narrow grounds. For instance, in *United States v. National Bank of Commerce*, 472 U.S. 713, 105 S. Ct. 2919, 86 L.Ed.2d 565 (1985), the Court held that the IRS had a right to levy upon a joint bank account for delinquent federal income taxes owed by only one of the owners of the account. *See id.* at 715, 724, 105 S. Ct. 2919. After discussing the specific characteristics of the taxpayer's rights under state law and under his contract with the bank, *see id.* at 723-24, 105 S. Ct. 2919, the Court was crystal clear about the specificity of its holding:

> We stress the narrow nature of our holding. By finding that the right to withdraw funds from a joint bank account is a right to property subject to administrative levy under § 6331, we express no opinion concerning the federal characterization of other kinds of state-law created forms of joint

[6] All of the cases to which the IRS cites for its contention that *Cole* has been overruled were before the *Craft I* panel save *Drye v. United States*, 528 U. S. 49, 120 S. Ct. 474, 145 L.Ed.2d 466 (1999), which we discuss *infra*.

> ownership. This case concerns the right to levy only upon joint bank accounts.

Id. at 726 n. 10, 105 S. Ct. 2919.[7] Likewise, in *United States v. Rodgers*, 461 U.S. 677, 103 S. Ct. 2132, 76 L.Ed.2d 236 (1983), the Court held that I.R.C. § 7403 permits a district court to order the sale of a delinquent taxpayer's home, despite the fact that his wife, with whom he owned the home pursuant to a state homestead law, did not owe any of the indebtedness. *See id.* at 680, 103 S. Ct. 2132. As the *Craft I* panel noted, however, the *Rodgers* Court "recognized that tenancies by the entirety posed a problem distinct from that of homestead estates, in that neither spouse owns an independent interest in an entireties property while both spouses own independent interests in a homestead estate." 140 F.3d at 643 (citing *Rodgers*, 461 U.S. at 702-03 n. 31, 103 S. Ct. 2132). Thus, as the *Craft I* panel was presented with no binding precedent that overruled *Cole*, we cannot say that its decision was clearly erroneous.[8]

[7] Indeed, the Third Circuit has stated that, "in *National Bank of Commerce* the Supreme Court acknowledged that if money is held by a husband and wife in a joint bank account as *tenants by the entireties* under applicable state law 'the Government could not use the money in the account to satisfy the tax obligations of one spouse.'" *Internal Revenue Serv. v. Gaster*, 42 F.3d 787, 791 (3d Cir. 1994) (citing *National Bank of Commerce*, 472 U. S. at 729 n. 11, 105 S. Ct. 2919) (internal footnote omitted; emphasis added).

[8] Nor do *Cole* and *Craft I* stand alone. As the *Craft I* panel noted, this court reiterated the rule of *Cole* in subsequent cases. *See* 140 F.3d at 642 (citing *United States v. Certain Real Property Located at 2525 Leroy Lane* ("*Leroy Lane I*"), 910 F.2d 343, 351 (6th Cir. 1990)); *id.* (citing *United States v. Certain Real Property Located at 2525 Leroy Lane* ("*Leroy Lane II*"), 972 F.2d 136, 138 (6th Cir. 1992)); *see also Gaster*, 42 F.3d at 791 n. 3, 793 (holding

In finding that our decision in *Craft I* was not clearly erroneous, we acknowledge that there are colorable arguments on both sides of the question whether a federal tax lien against a taxpayer's "property" or "rights to property," *see* I.R.C. § 6321, attaches to a tenancy by the entirety. Indeed, Judge Ryan's concurrence in *Craft I* illustrates this point, *see* 140 F.3d at 645-49 (Ryan, J., concurring) (arguing that, if transfer of property to Sandra Craft were to be set aside, federal tax lien would attach to Don Craft's "future interest" in Berwyck property), as does Judge Gilman's separate concurrence in the instant appeal. We further recognize that this court has held that federal law supersedes state property law in other circumstances. *See, e.g., Bank One Ohio Trust Co., N.A. v. United States*, 80 F.3d 173, 176 (6th Cir. 1996) (finding that restraint on alienation created by state law does not prevent federal lien from attaching to spendthrift trust under § 6321); *Liberty State Bank and Trust v. Grosslight (In re Grosslight)*, 757 F.2d 773, 775 (6th Cir. 1985) (finding that property held as tenancy by the entirety is part of bankruptcy estate). But the fact that colorable arguments exist on both sides of a particular issue does not imply that the *Craft I* panel's decision is "clearly erroneous." There are colorable arguments in virtually every case we hear. To hold that their existence in the present case permits us to reopen an issue we have already settled in this very case would destroy the concept of finality in our courts, negate the predictability our legal system provides to people in the conduct of their affairs, and risk the unjust results that

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that IRS may not levy against bank account of delinquent taxpayer held in tenancy by the entirety where taxpayer did not have unilateral right to withdraw funds).

would surely follow were litigants to "panel-shop" and pursue, willy-nilly, two or more bites at the apple of settled law.

The *Craft I* panel was bound by circuit precedent that was directly on point in reaching the conclusion it reached.[9] It was faced with no Supreme Court precedent that directly held otherwise, and this court has reiterated the holding relied upon by the *Craft I* panel on more than one occasion. Further, other courts have reached results consistent with that reached by the *Craft I* panel. For these reasons, we reject the IRS's argument that the decision reached by the *Craft I* panel was "clearly erroneous."[10]

2. Subsequent Contrary View of the Law

The IRS also argues that the law of the case doctrine does not apply here because the Supreme Court's recent decision in *Drye v. United States*, 528 U.S. 49, 120 S. Ct. 474, 145 L.Ed.2d 466 (1999), decided after *Craft I*, states a view of the law that is contrary to that expressed in *Craft I*. *See Hanover Ins. Co.*, 105 F.3d at 312. In *Drye*, the Court held that a taxpayer could not

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[9] As the concurrence acknowledges, the law-of-the-circuit doctrine prohibits a subsequent panel of this court from revisiting an earlier panel's decision when there has not been a change in the substantive law or an intervening Supreme Court decision. Inasmuch as the rule of *Cole v. Cardoza* remained good law, the *Craft I* panel was bound to follow it.

[10] Because the third exception to the law of the case doctrine requires a finding that a prior decision was both clearly erroneous *and* that it would work a manifest injustice, *see Hanover Ins. Co.*, 105 F.3d at 312, our holding that *Craft I* is not clearly erroneous makes it unnecessary for us to address the question of whether that decision will work a manifest injustice.

defeat a federal tax lien by disclaiming, pursuant to state law, his interest in his mother's estate. 120 S. Ct. at 478. The IRS argues that *Craft I* conflicts with the *Drye* Court's statements that: 1) federal law determines whether a right or interest created under state law constitutes "property" or "rights to property" for purposes of the federal tax lien statute, *see Drye*, 120 S. Ct. at 481; and 2) state law legal fictions do not bind the federal government for purposes of the federal tax lien statute, *see Drye*, 120 S. Ct. at 482. At oral argument, the IRS added that *Drye* stands for the "new" legal rule that a federal tax lien attaches to a taxpayer's right to inherit property. Upon careful review, we find that *Craft I* is essentially consistent with the *Drye* Court's reasoning.

a.

In *Drye*, the taxpayer (Drye) was insolvent, and the IRS had obtained valid tax liens against all of his "property and rights to property" pursuant to I.R.C. § 6321.[11] *Id.* at 479. Drye's mother died, and Drye was sole heir to her $233,000 estate. *Id.* at 478. Drye "disclaimed" all his interests in his mother's estate pursuant to state law; as a result, the estate passed to Drye's daughter. *Id.* at 479. Drye's daughter established a spendthrift trust with the proceeds of her grandmother's estate, naming as beneficiaries herself,

[11] I.R.C. § 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Drye, and her mother. *Id.* Although applicable state law provided that the assets of a spendthrift trust were shielded from creditors seeking to satisfy debts of the trust's beneficiaries, *see id.*, the Court held that Drye's disclaimer did not defeat the government's tax liens. *Id.* at 478. The Court summarized the relationship between § 6321 and state law as follows:

> The Internal Revenue Code's prescriptions are most sensibly read to look to state law for delineation of the taxpayer's rights or interests, but to leave to federal law the determination whether those rights or interests constitute "property" or "rights to property" within the meaning of § 6321. "[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the federal tax lien provision], state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States."

Id. at 478 (quoting *United States v. Bess*, 357 U.S. 51, 56-57, 78 S. Ct. 1054, 2 L.Ed.2d 1135 (1958) (brackets in original)). Under the approach taken in *Drye*, "We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of federal tax lien legislation." *Id.* at 481.

The IRS argues that the *Craft I* panel failed to apply this rule and relied instead on Michigan law to determine whether a taxpayer's involvement in a tenancy by the entirety constitutes property for the purposes of § 6321. We are not persuaded. First, we note that the

Supreme Court had stated prior to *Drye* the rule that a court must look to federal law to determine whether something constitutes "property" or "rights to property" for purposes of § 6321. *See, e.g., United States v. Irvine*, 511 U.S. 224, 238, 114 S. Ct. 1473, 128 L.Ed.2d 168 (1994) (noting the "general and longstanding rule in federal tax cases that although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed"); *National Bank of Commerce*, 472 U.S. at 727, 105 S. Ct. 2919 (stating that, "[t]he question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law" for purposes of federal tax collection)[12]. The *Craft I* court was aware of that

[12] This precise nature of this rule appears to have wavered over time. *Compare Aquilino v. United States*, 363 U. S. 509, 514, 80 S. Ct. 1277, 4 L.Ed.2d 1365 (1960) (discussing the "application of state law in ascertaining the taxpayer's property rights" in determining whether property is subject to federal tax lien) *with National Bank of Commerce*, 472 U. S. at 727, 105 S. Ct. 2919. Regardless of which formulation of the rule is adopted, the key point is that the federal question—*i.e.*, whether a state-law right constitutes "property" or "rights to property" under the statute—cannot be considered independently from the state-law question— *i.e.*, what is the nature and extent of the state-law right. When, as in this case, state law provides that there can be no individual interest in property held in a tenancy by the entireties, there is nothing which can be deemed "property" or "rights to property" under federal law. This understanding of § 6321 does not reflect a failure on the part of the *Craft I* majority to put substance over form, as the concurrence charges, but rather comports with the long-established principle that "federal law creates no property rights but merely attaches consequences . . . to rights created under state law." *Bess*, 357 U. S. at 55, 78 S. Ct. 1054 (1958).

rule, *see* 140 F.3d at 641, and, more important, applied it properly.[13]

The *Craft I* court's analysis is consistent with the two-step analysis described in *Drye*. *See* 120 S. Ct. at 481. The *Craft I* court first looked to Michigan law and found that: 1) Michigan law holds that an individual spouse possesses no separate interest in entireties property, *Craft I*, 140 F.3d at 643, and 2) Michigan law holds that an individual spouse possesses no future interest in entireties property, *see id.* at 644.[14] Thus,

[13] The IRS attacks the court's statement that, "state law governs the issue of whether any property interests exist in the first place," *Craft I*, 140 F.3d at 643 (citing *Rodgers*, 461 U. S. at 683, 103 S. Ct. 2132), as being inconsistent with *Drye*. As did the Supreme Court in *Drye*, we note that, upon careful review, some of the language we used in *Craft I* was not "phrased so meticulously" as we would have liked. *See Drye*, 120 S. Ct. at 481. We do not, however, read the sentence of which the IRS complains nor the approach taken in *Craft I* to be inconsistent with the analytic approach taken by the *Drye* Court: that state law determines the rights a taxpayer has in property and federal law determines whether those rights constitute "property" or "rights to property" pursuant to § 6321. *See Drye*, 120 S. Ct. at 481.

[14] In his separate concurrence, Judge Gilman cites to *Rogers v. Rogers*, 136 Mich. App. 125, 356 N.W.2d 288, 293 (1984), to support the proposition that Don Craft possessed a contingent future interest in the Berwyck Property. Although the *Rogers* court did acknowledge that each spouse "is entitled to the enjoyment of the entirety and to survivorship," it emphasized that "neither the husband nor the wife has an individual, separate interest in entireties property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other." *Rogers* is thus consistent with Michigan Supreme Court's refusal to recognize a severable future interest held by one spouse in an entireties property. *See Sanford v. Bertrau*, 204 Mich. 244, 169 N.W. 880, 881 (1918). Moreover, to the extent that *Rogers* can be construed as being inconsistent with

under Michigan law, Don had no individual interest in the entireties property; and, because state law delineated no individual interest or right held by Don, there was nothing for federal tax law to deem to be "property" or "rights to property" for purposes of I.R.C. § 6321. Accordingly, *Craft I* is fundamentally consistent with *Drye*. *See Rodgers*, 461 U.S. at 702-03 n. 31, 103 S. Ct. 2132 (stating that cases which have found that a federal tax lien does not attach to a tenancy by the entirety "because neither spouse possessed an independent interest in the property . . . do no more than illustrate the proposition that, in the tax enforcement context, federal law governs the consequences that attach to property interests, but state law governs whether any property interests exist in the first place.") (citing *United States v. American Nat'l Bank of Jacksonville*, 255 F.2d 504, 506 (5th Cir. 1958); *United States v. Hutcherson*, 188 F.2d 326, 331 (8th Cir. 1951)); *see also* 14 Mertens Law of Fed. Income Tax'n § 54A:13 (Supp. 2000) (citing *Craft I* for proposition that, although federal law determines whether a lien will attach to property interests held by delinquent taxpayer, "whether and to what extent a taxpayer has 'property' or 'rights to property' are [sic] determined under the applicable state law." (footnote omitted)).

b.

The IRS also argues *Craft I* is inconsistent with the *Drye* Court's refusal to subjugate federal tax law to state law legal fictions. *See Drye*, 120 S. Ct. at 482 (stating that "federal tax law 'is not struck blind by a disclaimer' " (quoting *Irvine*, 511 U.S. at 240, 114 S. Ct.

Sanford (which we believe it cannot), *Sanford* remains good law and is thus the controlling rule of decision.

1473)). But this proposition, too, had been established prior to *Craft I*, and the *Craft I* court was well aware of it. *See Craft I*, 140 F.3d at 643 (discussing *Irvine*, 511 U.S. at 240). Indeed, the *Craft I* court rejected the IRS's argument that it was being duped by a state law legal fiction. *See id.* We again reject the IRS's argument and find that the aspect of *Drye* reiterating the admonition regarding state law fictions is not a subsequent contrary view of the law. *See Hanover Ins. Co.*, 105 F.3d at 312; *Craft I*, 140 F.3d at 643.

c.

We are not at all persuaded by the IRS's last-minute characterization of *Drye* as standing for the proposition that a right to inherit property is subject to a federal tax lien. Because Don Craft had a conditional right to take the Berwyck property by survivorship pursuant to Michigan law (*i.e.*, should Susan predecease him), the argument goes, *see Craft I*, 140 F.3d at 642 (citing *Leroy Lane I*, 910 F.2d at 347), he comes under this purportedly "new" rule. This rendering of *Drye* is patently overbroad. If the Supreme Court intended to hold that every conceivable interest in property, no matter how remote, is subject to a federal tax lien, we have little doubt that it would have said so outright. We do not think it so held. Indeed, the *Drye* Court specifically stated (demonstrating that "analogy is somewhat hazardous in this area," *see Rodgers*, 461 U.S. at 685-86, 103 S. Ct. 2132) that a mere expectancy is not sufficient to constitute "property" or "rights to property" pursuant to § 6321: "Nor do we mean to suggest that an expectancy that has pecuniary value and is transferable under state law would fall within § 6321 prior to the

time it ripens into a present estate." [15] 120 S. Ct. at 482-83 n. 7; *see also United States* v. *Murray*, 217 F.3d 59, 63 (1st Cir. 2000) (stating that, pursuant to *Drye*, § 6321 is to be construed broadly, "but there are limits that reflect both common usage and policy. For example, the lien would likely not attach to land owned by a still-living relative of [the taxpayer], or to [his] expected inheritance of it, even if the relative had provided in his will that the land would go to [the taxpayer] on the relative's death."). [16] Thus, we reject the government's argument that *Drye* stands for the proposition that a federal tax lien attaches to any right to inherit property, no matter how remote. [17]

d.

In sum, *Drye* has not so fundamentally changed the legal landscape as to overrule *Craft I*. *See Blachy v. Butcher*, 221 F.3d 896, 907 (6th Cir. 2000) (Gilman, J.) (post-*Drye* decision distinguishing holding of *Craft I* from question of how to treat entireties property in bankruptcy case); *United States v. Green*, 201 F.3d 251, 253 (3d Cir. 2000) (citing *Drye*, 120 S. Ct. at 478, and indicating that federal tax lien does not attach to property held as tenancy by entirety pursuant to Pennsylvania law); *see also* Edward Kessel and Steven R. Klammer, *Supreme Court Finds Disclaimer Ineffective to Avoid Federal Tax Lien*, 92 J. Tax'n 118, 122 (2000) (discussing impact of *Drye* and suggesting that, even after decision, federal tax lien law may not apply to dower, curtesy, or elective share rights). Accordingly, the IRS's argument on appeal is precluded by the law of the case doctrine.

[15] In the instant case, Don Craft's expectancy of inheritance never ripened into a present estate. Indeed, Don predeceased Sandra.

[16] This is significant because the only interest which any member of the *Craft I* panel concluded might be subject to a federal tax lien was a future interest. *Compare* 140 F.3d at 644 *with id.* at 646 (Ryan, J., concurring).

[17] The concurrence criticizes the court for "going too far" in characterizing the IRS's argument in these terms. However, IRS counsel expressly endorsed this reading of the *Drye* decision during oral argument.

B. Law of the Circuit

Our decisions in *Craft I* and in *Cole* are also law of the circuit. As we recently stated, "One panel of this court may not overturn the decision of another panel of this court—that may only be accomplished through an en banc consideration of the argument." *Pollard v. E.I. DuPont de Nemours Co.*, 213 F.3d 933, 945 (6th Cir. 2000). As discussed, *supra*, *Craft I* is not clearly erroneous, and it has not been called into doubt by any decision of the Supreme Court. [18] Because this panel may not conduct a plenary review of the result reached by a

[18] In his concurrence, Judge Gilman twice "recommend[s] that this case be revisited en banc." There is a clearly delineated procedure under the Federal Rules for a party to seek review of a matter en banc. *See* Fed. R. App. P. 35(b). The government is obviously aware of this procedure in that it previously filed a petition for en banc review of *Craft I*, although its petition did not garner a single vote. Moreover, this court's published Internal Operating Procedures provide that any active judge of this court may request, *sua sponte*, a request for a poll for rehearing on [*sic*] banc, even in the absence of a petition from a party. *See* 6 Cir. I.O.P. 35(c). We think it appropriate to reserve any discussion of whether this case should be reheard en banc as a part of the process contemplated by the aforementioned rules.

prior panel, the decision reached by the *Craft I* must stand.[19]

III. SANDRA'S CROSS-APPEAL

In her cross-appeal, Sandra first argues that the IRS was precluded from arguing on remand the fraudulent enhancement theory upon which it ultimately won relief. Next, Sandra argues that the governing statute of limitations barred the IRS's recovery under its fraudulent enhancement theory. Third, she claims that the IRS's remedy became moot upon Don's death. Finally, Sandra asserts that the IRS owes her interest on the funds to which she became entitled pursuant to our opinion in *Craft I*. Sandra has also submitted to this court a motion for costs under both Fed. R. App. P. 38 and the Equal Access to Justice Act, 28 U.S.C. § 2412. For the reasons that follow, we **AFFIRM** the judgment of the district court and **DENY** Sandra's motion for costs.

A.

Upon remand, the IRS argued two theories of recovery before the district court: first, that the August 1989 transfer from Don and Sandra to Sandra was a fraudulent *conveyance* pursuant to Michigan law, *see* Mich. Comp. Laws §§ 566.11-.23; and second, in the alternative, that Don's payment of mortgage and property tax obligations[20] from 1979 to 1985 on behalf of the

[19] All of the IRS's arguments on appeal require us to reject the holding of *Craft I*. Since we are unable to do that for the reasons discussed above, we **DISMISS** the government's appeal.

[20] On appeal, the government argues only that the mortgage payments—and not the property tax payments—constituted a fraudulent enhancement of the property.

entireties property constituted a voidable, fraudulent *enhancement* of the property. Sandra objected to the fraudulent enhancement theory (she contends that she did do early and often, *see infra*) on the grounds that the IRS had not raised the theory until immediately prior to trial, and that the theory went beyond the scope of this court's remand. The district court rejected Sandra's objection, and found that although the IRS had not raised specifically the fraudulent enhancement issue in its answer to Sandra's complaint,[21] the issue was tried by the implied consent of the parties, pursuant to Fed. R. Civ. P. 15(b).

In her cross-appeal, Sandra argues that the district court erred by permitting the IRS to argue on remand its new theory of fraudulent enhancement. First, Sandra asserts that the fraudulent enhancement issue went beyond the scope of this court's remand. Second, Sandra claims that she did not consent to trial of the new theory, but rather "objected repeatedly, vehemently and at every possible opportunity to the IRS raising a new issue for the first time on remand." Appellee's Br. at 16. For the reasons that follow, Sandra's arguments fail.

1. Scope of Remand

Sandra contends that the only issue before the district court on remand was whether she and Don fraudulently transferred the property to Sandra when they executed the August 28, 1989 quitclaim deed. *See Craft I*, 140 F.3d at 644. The IRS claims that this court left open the broader question of whether *any* fraudu-

[21] The IRS had raised the fraudulent conveyance argument as a defense in its answer to Sandra's complaint.

lent conveyance occurred with regard to the Berwyck Property. The *Craft I* court stated as follows:

> [T]here remains an issue of whether a fraudulent conveyance occurred in this case, an issue that the district court did not address. Under Michigan law, one spouse cannot use the doctrine of tenancy by the entirety to defeat the rights of a judgment creditor. Such a fraudulent transfer can be set aside . . . . The issue of whether a fraudulent conveyance occurred in this case is a matter that should be determined by the district court. If the conveyance was fraudulent and therefore set aside, the IRS could be entitled to half the proceeds of the June 1992 sale, or $59,944.10. Accordingly, upon remand, the district court should consider whether the Berwyck Property was transferred for fraudulent purposes.

Id. (citations omitted).

The district court did not exceed the scope of our remand by considering the issue of whether Don's mortgage payments constituted a fraudulent transfer under Michigan law. The last sentence of the above-quoted section of *Craft I*, which directed the district court to "consider whether the Berwyck Property was transferred for fraudulent purposes," does not raise exclusively the question of whether the August 1989 transfer itself was fraudulent; rather, it permitted the district court to consider also whether Don and Sandra transferred the property for other fraudulent purposes as well. *See id.* This conclusion is consistent with the opening sentence of the *Craft I* court's fraudulent conveyance discussion, which states in broad terms that "there remains an issue of whether a fraudulent conveyance occurred in this case." *See id.* It is also consistent with this court's broad statement that, "[t]he issue of whether a fraudulent conveyance occurred in this case is a matter that should be determined by the district court." *See id.* As we read this language, *Craft I* directed the district court to investigate whether the facts of this case constituted a fraudulent conveyance under Michigan law. This is exactly what the district court did. It found that under Michigan law, the August 1989 transfer could not be fraudulent, because Michigan courts have "consistently held that creditors have no right to complain of a debtor's disposition of exempt [*i.e.*, entireties] property because such property could not be reached to satisfy debts had it remained in the debtor's hands." *See, e.g., Cross v. Commons*, 336 Mich. 665, 59 N.W.2d 41, 43 (1953) (en banc). The court went on, however, to find that Don's mortgage payments were fraudulent under an exception to that rule. *See McCaslin*, 292 N.W. at 699. The court's consideration and application of Michigan fraudulent conveyance law was in harmony with the scope of the *Craft I* court's remand, and we reject Sandra's contention otherwise.

2. Implied Consent

Sandra also argues that the district court erred in permitting the IRS to argue its fraudulent enhancement theory upon remand because she did not consent to trial of the issue. The district court found that Sandra had impliedly consented to trial of the fraudulent enhancement theory by failing to object to the IRS's claim until after the trial; by consenting to the Joint Final Pretrial Order, which indicated that the enhancement claim was a controverted issue for trial; and by failing to object at trial to the government's

evidence that Don made payments on behalf of the entireties property from 1979 to 1985, which "could have been relevant only to the Government's contention that Don's payments into the entireties property from 1979 through 1985 while he was insolvent were fraudulent." Sandra asserts that she objected to the fraudulent enhancement theory at the final pretrial conference, "an event for which there is unfortunately no recorded transcript," Appellee's Br. at 18, and in her post-trial brief. Sandra also alleges that the fact that the Joint Final Pretrial Order lists among the "Controverted and Unresolved Issues for Trial" the issue of whether Don made fraudulent conveyances into the tenancy by the entirety at a time when he was insolvent actually shows that she objected to the issue prior to trial. Sandra further argues that she did not object to the enhancement theory at trial because the judge had indicated that the trial would be "relaxed," and that he had ordered the parties to submit their legal arguments as part of their post-trial briefs rather than present them at trial. Lastly, Sandra argues that the evidence that the government put on at trial did not necessarily go to the enhancement issue; thus, her failure to object to it did not imply her consent to try the issue.

"Fed. R. Civ. Pro. [sic] 15(b) states that issues tried by the express or implied consent of the parties shall be treated in all respects as if they had been raised in the pleadings." *Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir. 1982); *see also* Fed. R. Civ. P. 15(b). Although the parties agree that this court reviews for clear error the district court's finding that the IRS was not precluded from raising the fraudulent enhancement issue, we think the better view is that we review for abuse of

discretion the district court's decision regarding whether an issue not raised in the pleadings has been tried by the implied consent of the parties. *See Moncrief v. Williston Basin Interstate Pipeline Co.*, 174 F.3d 1150, 1160 (10th Cir. 1999); 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1493, at 41 (2d ed. 1990).

The district court did not abuse its discretion in finding that Sandra impliedly consented to trial of the fraudulent enhancement theory. First, because the theory of fraudulent enhancement constitutes a well-established exception to Michigan fraudulent conveyance law, *see supra*, Sandra was on notice from the time of the government's answer to her complaint that fraudulent enhancement could be at issue in the case. Further, as the government points out, although Sandra agreed that *whether the government should prevail* on the enhancement theory was a controverted issue for trial, she did not move to include the question of *whether the government could argue* the theory as a controverted issue in the Joint Final Pretrial Order. Finally, although the trial on remand was, in the words of the court, "more casual than a trial sometimes looks"—the trial took place with the parties, witnesses, and the judge sitting around a table in the courtroom—the court admonished the parties that "it's still a federal court, and all the rules apply." *See Carlyle*, 674 F.2d at 556 (finding that where defendant raised defense for first time at trial, and then offered evidence of the defense, defense was argued by implied consent of the plaintiff for purposes of Rule 15(b)). *Cf. Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992).

Regardless of whether Sandra objected in a timely fashion to the government's theory, her argument fails

because she cannot show that she has been prejudiced by the district court's decision to permit the IRS to argue the enhancement theory. Under Rule 15(b), "a district court may consider claims outside of those raised in the pleadings so long as doing so does not cause prejudice." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 569 (2d Cir. 2000); *see also* 6A Wright et al., § 1493, at 36-40 ("Prejudice in this context means a lack of opportunity to prepare to meet the unpleaded issue."). Sandra cannot show that she suffered prejudice simply because the IRS changed its legal theory. *See Cruz*, 202 F.3d at 569. "Instead, a party's failure to plead an issue it later presented must have disadvantaged its opponent in presenting its case." *Id.* (quotation marks and citation omitted). Sandra knew of the government's theory prior to trial because the government had argued it in its pre-trial brief. Further, she argued the issue in her post-trial brief, which the district court considered. She was not prohibited from cross-examining the government's witnesses on the issue if she so chose, and she does not argue that she needed to discover additional evidence to defend against the fraudulent enhancement theory. Thus, the government's argument did not prejudice Sandra, and the issue was tried by her implied consent.

B.

Sandra next argues that the district court erred by failing to find that the government's fraudulent enhancement claim was not barred by the statute of limitations contained in I.R.C. § 6502. Sandra asserts no case law in her favor, and her claim has no merit.

We review de novo a district court's determination that a complaint was filed outside the relevant statute of limitations. *See Tolbert v. State of Ohio Dep't of*

Transp., 172 F.3d 934, 938 (6th Cir. 1999). The parties agree that the IRS assessed Don's federal tax liabilities in July 1988. At that time, § 6502 contained a six-year limitations period within which the IRS could begin collection proceedings on a tax assessment. *See* I.R.C. § 6502(a)(1) (1989). The statute provided that the limitations period begins to run on the date of the assessment of the tax. *See id.* Thus, under the statute in effect at the time, the IRS had until July 1994 to begin collection proceedings against Don. However, Congress amended the statute in 1990 to increase the § 6502 limitations period to ten years. *See* I.R.C. § 6502 (Historical and Statutory Notes). The amendment applied the new ten-year period to taxes already assessed for which the six-year limitations period had not expired. *See id.* Because Don's tax debts had already been assessed and the six-year limitations period had not run on the IRS's claim, the ten-year limitations period applied to Don's tax debts. Accordingly, the IRS had until July 1998 to begin collection proceedings against Don.

The government filed its answer to Sandra's complaint in July 1993. Because the government's fraudulent enhancement claim was tried by implied consent, *see supra*, its claim must be "treated in all respects as if [it] had been raised in the pleadings." *See* Fed. R. Civ. P. 15(b). The claim is thus deemed filed on the date that the IRS filed its answer in July 1993, well within the ten-year limitations period that began running in July 1988. *See id.*; Fed. R. Civ. P. 15(c).

C.

Sandra argues that Don's death in August 1998 makes moot the IRS's remedy in this case. She claims that the government stipulated at an early point in the

case that its lien attached to proceeds of the sale of the Berwyck Property to the same extent that the lien attached to the property itself;[22] once this court found that the tax lien did not attach to the property, *see Craft I*, 140 F.3d at 643-44, the lien attached to nothing and the IRS had nothing to enforce. In the alternative, Sandra asserts that the *Craft I* holding requires that the government's lien against the property was unenforceable until either Don and Sandra died, or until the couple divorced. *See Leroy Lane II*, 972 F.2d at 138. Under Sandra's theory, the proceeds of the sale of the entireties property revert to Sandra upon Don's death, and the IRS cannot reach them. These theories fail.

We review questions of mootness de novo. *See Comer v. Cisneros*, 37 F.3d 775, 787 (2d Cir. 1994). By operation of law, the IRS's lien attached to all of Don's property and rights to property. *See* I.R.C. § 6321. Although this court found that Don had no individual interest—present or future—in the entireties property, *see Craft I*, 140 F.3d at 643-44, the IRS did not gain recovery upon a theory that Don had an individual interest in the entireties property. Rather, the district court found that the IRS could recover the value of mortgage payments Don made on behalf of the entireties property under a fraudulent enhancement theory. In other words, Don essentially hid funds to which the IRS was entitled (by virtue of its lien) by investing them in a property to which the lien could not attach. *See McCaslin*, 292 N.W. at 699; *accord Hoerner v.*

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[22] The government disputes the stipulation to which Sandra refers, arguing that it agreed to release of the proceeds upon "resolution of the tax lien dispute." The exact nature of the stipulation is not clear from the record, but that does not impede our resolution of the issue. *See infra*.

Elkins (In re Elkins), 94 B.R. 932, 934-35 (Bankr. W.D. Mich. 1988). Thus, Sandra's arguments, which presume that the district court awarded the IRS proceeds of the sale of the property on the basis that Don had some kind of individual interest in the Berwyck Property, are misplaced. Rather, the court awarded the IRS's remedy on the basis that Don used his own funds to enhance the property in order to avoid paying his tax debts.

D.

On October 26, 1995, the district court ordered that the government receive $50,293.94 of the escrowed proceeds from the sale of the Berwyck Property. Subsequent to this court's remand, the district court determined that the government was entitled to only $6,693 from the escrowed sales proceeds. Sandra argues that, pursuant to 28 U.S.C. § 2411, she is entitled to interest on the $43,600.94 (*i.e.*, $50,293.94 less $6,693) that the government has possessed since October 1995.

Section 2411 provides as follows:

> In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such

date to be determined by the Commissioner of Internal Revenue.

28 U.S.C. § 2411. Citing *Spawn v. Western Bank-Westheimer*, 989 F.2d 830, 834 (5th Cir. 1993), the district court denied Sandra's motion for an award of interest on the basis that "[§ 2411] applies only to tax refund cases." The court reasoned that the statute's use of the terms "overpayment" and "payment" indicates that it was intended to apply only in cases where the taxpayer has paid a disputed tax liability and then seeks a refund. Because Sandra brought the instant case as an action to quiet title rather than as a tax refund case, and because the government obtained Sandra's funds pursuant to a court judgment rather than by virtue of an overpayment or payment of tax obligations, the court rejected Sandra's request for interest payments. We review de novo the district court's interpretation of § 2411. *See State of Mich. v. United States*, 141 F.3d 662, 664 (6th Cir. 1998).

Sandra asserts that § 2411 applies to her case because the funds she will recover constitute an overpayment, and because she will recover them pursuant to a court judgment. The IRS responds that a plaintiff may not collect interest against the federal government unless it has specifically waived its sovereign immunity, and § 2411 contains no such waiver for suits to quiet title. In addition, the IRS argues that the funds Sandra will receive are not an "overpayment" of taxes. *See* 28 U.S.C. § 2411.

A plaintiff may not recover interest from the federal government in the absence of an express waiver of its sovereign immunity from suit. *See Library of Congress v. Shaw*, 478 U.S. 310, 314, 106 S. Ct. 2957, 92 L.Ed.2d

250 (1986). In determining whether Congress has expressly waived the government's immunity, a court must "construe waivers strictly in favor of the sovereign, and not enlarge the waiver beyond what the language requires." *Id.* at 318, 106 S. Ct. 2957 (citations and quotation marks omitted). As the *Shaw* Court noted, Congress has expressly authorized interest claims against the government in the circumstances described by § 2411. *See id.* at 318-19 n.6, 106 S. Ct. 2957. Because § 2411 authorizes payment of interest based upon "any judgment of any court rendered . . . for any overpayment in respect of any internal-revenue tax," the question in this case becomes whether the escrowed $43,600.94 held by the IRS constitutes an "overpayment" with respect to an internal-revenue tax. *See* 28 U.S.C. § 2411.

As did the district court, the government relies on *Spawn* to suggest that an "overpayment" refers only to tax refunds. *See* 989 F.2d 830. The *Spawn* court stated that § 2411 "expressly authorizes awards of prejudgment and postjudgment interest against the United States in tax refund cases." *Id.* at 834. But the court made this statement only in passing—*Spawn* was not a tax case—and lifted it directly from the Supreme Court's description of § 2411 in *Shaw*. *See id.* (citing *Shaw*, 478 U.S. at 318-19 n. 6, 106 S. Ct. 2957). In *Shaw*, the Supreme Court simply cited § 2411 as one of several examples of Congress expressly waiving the government's immunity with respect to interest awards, describing § 2411 in a parenthetical as "expressly authorizing prejudgment and postjudgment interest payable by the United States in tax-refund cases." *Shaw*, 478 U.S. at 318-19 n.6, 106 S. Ct. 2957. This parenthetical description of a statute, contained in

a footnote within dicta, is not dispositive of the meaning of § 2411.

The language of § 2411 is broad. *Cf. Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 531, 68 S. Ct. 229, 92 L.Ed. 142 (1948). Sandra, however, has not met her burden of proof on the interest claim. The only case she cites in support of her theory is *Steiner v. Nelson*, 199 F.Supp. 441 (E. D. Wis. 1961), *aff'd*, 309 F.2d 19 (7th Cir. 1962). In *Steiner*, the court held that even where the IRS obtains funds from a taxpayer based on an illegal tax assessment, the taxpayer is *not* entitled to interest under § 2411. *See* 199 F. Supp. at 441-42. Thus, as the government notes, *Steiner* actually lends support to *its* position. Although we are not bound by the reasoning or result of the *Steiner* court, we hold that, on the facts of this case, Sandra has failed to carry her burden of proving her case pursuant to § 2411.

E.

In June of this year, Sandra filed a motion with this court to recover litigation costs pursuant to either the Equal Access to Justice Act, 28 U.S.C. § 2412, or under Fed. R. App. P. 38. The panel deferred ruling on the motion until oral argument. In the motion, Sandra argues that the government's appeal simply asserts the same issue, arguments, and case law rejected by the *Craft I* panel. Because the government is bound by the law of the case doctrine, Sandra claims its appeal is brought in bad faith. The government responds that Sandra should be denied costs because it was substantially justified in bringing its appeal, *see* I.R.C. § 7430, and because its appeal is not frivolous, as required by Rule 38.

Fed. R. App. P. 38. That rule provides:

> If a court of appeals determines that an appeal is frivolous, it may after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

In *Martin v. CIR*, this court warned litigants of our "ample authority" to assess double costs and "just damages" against an appellant in a frivolous appeal: "In future such cases this court will not hesitate to award damages when the appeal is frivolous, or taken merely for purposes of delay, involving an issue or issues already clearly resolved." 756 F.2d 38, 41 (6th Cir. 1985) (quotation marks omitted); *accord Sisemore v. United States*, 797 F.2d 268, 271 (6th Cir. 1986); *Wilton Corp. v. Ashland Castings Corp.*, 188 F.3d 670, 676 (6th Cir. 1999). Recently, this court concluded that even though an appeal is not made in "bad faith," an appellee may garner costs if an appeal is "wholly without merit." *Wilton Corp.*, 188 F.3d at 677. Although the IRS's appeal is precluded by both the law of the case and law of the circuit doctrines, we have acknowledged that the government raised colorable—if not persuasive—arguments in its appeal, *see supra*. Accordingly, we deny Sandra's motion for costs pursuant to Rule 38.

We also deny Sandra's motion for costs pursuant to § 2412. Sandra has failed to articulate why she merits costs pursuant to that statute. Rather, she simply reasserts her argument that the government's appeal is precluded at this time. Further, certain monetary awards in tax cases may be awarded only pursuant to I.R.C. § 7430. *See* 28 U.S.C. § 2412(e); *see also Sisemore*, 797 F.2d at 271. The provisions of § 7430 are "not

automatic," and "are limited by a whole host of conditions and requirements." *Beaty v. United States*, 937 F.2d 288, 292 (6th Cir. 1991). Sandra has articulated none of these conditions or requirements, and, indeed, has failed even to discuss whether § 7430 applies to her case. Accordingly, we reject her motion for costs.[23]

IV. CONCLUSION

For the reasons discussed above, we **DISMISS** the government's appeal as precluded by both the law of the case and law of the circuit doctrines. We further **AFFIRM** the district court's judgment, and **DENY** Sandra's motion for litigation costs brought pursuant to Rule 38 and 28 U.S.C. § 2412.

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[23] The motion also sought dismissal of the government's appeal. We DENY Sandra's motion in its entirety.

CONCURRENCE

RONALD LEE GILMAN, Circuit Judge, concurring in the judgment. Because I agree that we are bound by *Craft I* for the reasons that are well stated in the court's opinion, I concur in the judgment. I also fully concur in the court's disposition of Sandra Craft's cross-appeal. Nevertheless, I believe that the result reached in *Craft I*, and that this court endorses today, is inconsistent with Supreme Court precedent and should be reversed. I therefore write separately to identify the bases for my disagreement with *Craft I* and to recommend that this case be revisited en banc.

As Judge Ryan pointed out in his dissent in *Craft I*, the legal landscape has changed considerably since 1971, when this court held in *Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971), that a federal tax lien against an individual taxpayer cannot attach to property held by that taxpayer as a tenant by the entirety. In the interim, the Supreme Court has made clear that the IRS's power under 26 U.S.C. § 6321 to attach the individual property rights of a delinquent taxpayer is extensive, if not plenary. *See United States v. National Bank of Commerce*, 472 U.S. 713, 719-20, 105 S. Ct. 2919, 86 L.Ed.2d 565 (1985) (holding that § 6321 "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have"); *Jewett v. Commissioner of Internal Revenue*, 455 U. S. 305, 309, 102 S. Ct. 1082, 71 L.Ed.2d 170 (1982) (concluding that Congress intended federal tax liens to attach to "every species of right or interest protected by law and having an exchangeable value" (citation and

internal quotation marks omitted)). Although state property law determines what rights to property a person enjoys, federal law dictates whether a tax lien may attach to those rights. *See National Bank of Commerce*, 472 U.S. at 722, 727, 105 S. Ct. 2919.

In the years since *Cole*, the Supreme Court has held that state law "legal fictions" will be ignored insofar as the federal tax laws are concerned. *See United States v. Irvine*, 511 U.S. 224, 240, 114 S. Ct. 1473, 128 L.Ed.2d 168 (1994). The *Irvine* Court considered whether the federal gift tax applied to a transfer that occurred when a mother disclaimed her interest in a trust, thereby allowing that interest to pass to her children. Upon the termination of a trust established by her grandfather, Sally Irvine became entitled to a share of the trust principal. She disclaimed part of her share, effectively transferring that part to her children. Under Minnesota law, "an effective disclaimer of a testamentary gift is generally treated as relating back to the moment of the original transfer of the interest being disclaimed, having the effect of canceling the transfer to the disclaimant *ab initio* and substituting a single transfer from the original donor to the beneficiary of the disclaimer." *Id.* at 239, 114 S. Ct. 1473. Thus, the share that Irvine's children received was considered by Minnesota law as if it had never been possessed by Irvine, but rather as if it had been transferred directly from the trust to Irvine's children.

Nevertheless, the Supreme Court held that Irvine's disclaimer in favor of her children was taxable, declaring that "the federal gift tax is not struck blind by a disclaimer." *Id.* at 240, 114 S. Ct. 1473. In other words, for federal tax purposes, the key inquiry is what rights an individual actually possesses under state law, not

how the state characterizes those rights. *See id.; see also Drye v. United States*, 528 U.S. 49, 120 S. Ct. 474, 482 n.5, 145 L.Ed.2d 466 (1999) ("[I]t is not material that the economic benefit to which the [taxpayer's local law property] right pertains is not characterized as 'property' by local law." (quoting W. Plumb, Federal Tax Liens 27 (3d ed. 1972) (alterations in original))).

The appropriate inquiry, then, as stated by Judge Ryan in *Craft I*, is "what state-defined rights, if any, did Don Craft have in the Berwyck property?" *Craft I*, 140 F.3d 638, 645 (Ryan, J., concurring). First, Don Craft had the right to enter and enjoy the property to the exclusion of all others, except for Sandra Craft. *See* Mich. Comp. Laws § 557.71. If the Crafts had decided to rent or sell the property, Don Craft would have received half of the proceeds. *See id.* He further possessed a contingent future interest, because he would have taken the entire estate in fee simple if Sandra had predeceased him. *See Rogers v. Rogers*, 136 Mich. App. 125, 356 N.W.2d 288, 293 (1984) ("[E]ach spouse is considered to own the whole and, therefore, is entitled to the enjoyment of the entirety and to survivorship."). Finally, if the Crafts had divorced, they would have become tenants in common, and Don Craft would have had the right to bring an action for partition and sale. *See* Mich. Comp. Laws § 552.102.

The fact that Don Craft could not have independently sold his share in the tenancy by the entirety does not alter the fact that his rights to the property had value. "Under the great weight of federal authority, . . . such restraints on alienation are not effective to prevent a federal tax lien from attaching under 26 U.S.C. § 6321." *Bank One Ohio Trust Co. v. United States*, 80 F.3d 173, 176 (6th Cir. 1996).

The majority in *Craft I* was aware of these rights, and acknowledged that "a federal tax lien can attach to a future or contingent interest in property." *Craft I*, 140 F.3d at 644. *Craft I* rejected the IRS's claim, however, on the ground that "state law determines the nature of the legal interest which a taxpayer has in a property," and "[i]n Michigan, it is well established that one spouse does not possess a separate interest in an entireties property." *Craft I*, 140 F.3d at 643-44.

I believe that the *Craft I* majority committed a subtle but critical error in accepting at face value Michigan's *description* of the property interests held by a tenant by the entirety, rather than looking past that description to the *actual substance* of those interests under Michigan law. In *Irvine*, the Supreme Court acknowledged that, under Minnesota law, a disclaimant is considered as if she never held any interest in the property whatsoever. *Irvine*, 511 U.S. at 239. Nevertheless, the Court looked past Minnesota's characterization of Irvine's property interest and held that the gift tax could attach because, in actuality, Irvine exercised control over the disposition of the property—a right that had unquestionable value. *Id.* at 240.

In contravention of *Irvine*, the majority in *Craft I* failed to look past Michigan's characterization of an individual's interest in entireties property and ignored the substantial rights actually held by Don Craft, which similarly had undeniable value. In other words, I believe that the majority in *Craft I* was "struck blind" by Michigan's "legal fictions."

To my mind, then, *Craft I* reached the wrong result, and the IRS ought to have had the right to attach Don Craft's valuable interest in the tenancy by the entirety. Nevertheless, two related doctrines require that I

concur with the result reached by the court. The first is the law-of-the-case doctrine, which provides that "[a]n earlier appellate court's decision [in the same case] as to a particular issue may not be revisited unless 'substantially new evidence has been introduced, . . . there has been an intervening change of law, or . . . the first decision was clearly erroneous and enforcement of its command would work substantial injustice.' "*United States v. Corrado*, 227 F.3d 528, 533 (6th Cir. 2000) (citation omitted). Second, the law-of-the-circuit doctrine provides that, absent an intervening change in the law, "a panel of this court may not overrule a previous panel's decision." *Meeks v. Illinois Cent. Gulf R.R.*, 738 F.2d 748, 751 (6th Cir. 1984).

Craft I is both the law of this case and the law of the circuit. Without delving into the precise differences between the two, suffice it to say that the law-of-the-circuit is the stronger of the two doctrines, and therefore provides the relevant test for whether *Craft I* can be revisited by this panel. *See LaShawn v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) ("While the law-of-the-case doctrine offers several exceptions . . . the law-of-the-circuit doctrine is much more exacting."). Under the law-of-the-circuit doctrine, a subsequent panel can only revisit an earlier panel's decision if there has been "a change in the substantive law or an intervening Supreme Court decision." *Smith v. U.S. Postal Service*, 766 F.2d 205, 207 (6th Cir. 1985). There has been no substantive change since *Craft I* to the relevant provisions of either Michigan property law or federal tax law.

The IRS argues, however, that the case of *Drye v. United States*, 528 U.S. 49, 120 S. Ct. 474, 145 L.Ed.2d 466 (1999), decided after *Craft I*, is a contrary, inter-

vening Supreme Court decision. In that case, a delinquent taxpayer who was subject to a federal tax lien disclaimed any interest in his mother's estate after her death, causing the estate to pass to his daughter. Under the relevant state law, "such a disclaimer creates the legal fiction that the disclaimant predeceased the decedent," with the consequence that "[t]he disavowing heir's creditors . . . may not reach property thus disclaimed." *Id.* at 476. Nevertheless, the Supreme Court relied on *Irvine* and disregarded the legal fiction, holding that the taxpayer's interest in his mother's estate was a "right to property" subject to the federal tax lien.

Sandra Craft responds that *Drye* does not represent a change in the law, but is simply a reaffirmation and application of prior cases in this area. I agree. To the extent that *Drye* is inconsistent with *Craft I*—and I believe that it is—that inconsistency was considered, and rejected, by this court in *Craft I* in its discussion of *Irvine* and *National Bank of Commerce*. Although the IRS is technically correct that *Drye* is a "subsequent, contrary view of the law by a controlling authority," this formulation is incomplete. The purpose of the intervening-controlling-authority exception is to allow a subsequent panel of this court to respond to a new *precedent*, unavailable to the prior panel, not just a new *decision*. Otherwise, a loophole would exist under which a subsequent panel could freely revisit a decided issue simply by referencing a later Supreme Court decision that does nothing more than restate the existing precedent. "Were matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit." *LaShawn*, 87 F.3d at 1395 (examining the law- of-the-circuit doctrine).

I disagree, however, with the court's conclusion in Part II.A.2. that "*Craft I* is essentially consistent with the *Drye* Court's reasoning." Op. at 366. The court also asserts that "under Michigan law, Don had no individual interest in the entireties property." Op. at 367. I do not believe that this statement squares with either reality or with Michigan law. As discussed above, Don Craft in fact possessed at the very least a contingent future interest under Michigan law and would have taken the entire estate in fee simple had he survived Sandra. *See Rogers v. Rogers*, 136 Mich. App. 125, 356 N.W.2d 288, 293 (1984).

Furthermore, the court goes too far when it suggests that the IRS is arguing that "*Drye* stands for the proposition that a federal tax lien attaches to any right to inherit property, no matter how remote." Op. at 368-69. A key distinction between a tenancy by the entirety and a contingent expectancy is the latter's revocability. Although a hoped-for inheritance could be subject to the whims of an ailing, fickle relative, the rights associated with an entireties property are clearly irrevocable. Such was the case with the Berwyck property.

In sum, I believe that we are bound by the holding of *Craft I*, and I therefore concur in the result reached by the court. But I also believe that *Craft I* contravenes recent Supreme Court decisions and would therefore recommend that this case be revisited en banc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-1734; 99-1737

SANDRA L. CRAFT,
PLAINTIFF -APPELLEE/CROSS-APPELLANT

v.

UNITED STATES OF AMERICA,
ACTING THROUGH THE COMMISSIONER
OF INTERNAL REVENUE,
DEFENDANT -APPELLANT/CROSS-APPELLEE

Before: KEITH, COLE, and GILMAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the government's appeal is DISMISSED as precluded by both the law of the case and law of the circuit doctrines. IT IS FURTHER ORDERED that the judgment of the district court regarding plaintiff Sandra Craft's claims is AFFIRMED.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN
LEONARD GREEN, CLERK

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-1734/1737

SANDRA L. CRAFT,
PLAINTIFF -APPELLEE/CROSS-APPELLANT

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT/CROSS-APPELLEE

Before: KEITH, COLE, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN
LEONARD GREEN, CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 96-1038, 96-1039

SANDRA L. CRAFT,
PLAINTIFF -APPELLANT/CROSS-APPELLEE

v.

UNITED STATES OF AMERICA,
ACTING THROUGH THE COMMISSIONER
OF INTERNAL REVENUE,
DEFENDANT -APPELLEE/CROSS-APPELLANT

Argued September 16, 1997
Decided and Filed: April 1, 1998

Before: RYAN, SUHRHEINRICH, and COLE, Circuit Judges.

COLE, J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. RYAN, J. (pp. 645-649), delivered a separate concurring opinion.

OPINION

COLE, Circuit Judge

R. GUY COLE, Jr., Circuit Judge. Sandra Craft appeals the district court's order granting summary judgment in favor of the United States, in which the district court found that a federal tax lien filed against the property of Sandra's husband for his individual unpaid tax liabilities attached to property held by Sandra and her husband, first as tenants by the entirety and then jointly conveyed to Sandra. The United States, in turn, cross-appeals the district court's determinations of when the lien attached and the value of Sandra's husband's interest in the property. For the following reasons, we **REVERSE** the district court's grant of summary judgment in favor of the United States and **REMAND** for further proceedings in accordance with this opinion.

I.

Sandra Craft and her husband, Don, purchased real property located at 2656 Berwyck Road in Grand Rapids, Michigan (hereinafter the "Berwyck Property") as tenants by the entirety on May 26, 1972 for $48,000, encumbered by a $37,000 mortgage. Don failed to file income tax returns for the taxable years 1979 through 1986. The Internal Revenue Service accordingly prepared substitute income tax returns for these years as permitted by the provisions of 26 U.S.C. § 6020(b) and assessed $482,446.73 in unpaid tax liabilities against him. The IRS advised Don of these liabilities in 1988; Don nonetheless failed to pay these assessments. The IRS then filed a notice of federal tax lien on March 30, 1989 against all of Don's property or rights in property with the Register of Deeds in Kent County, Michigan.

Don and Sandra thereafter executed a quitclaim deed on the Berwyck Property, transferring the property to Sandra in exchange for one dollar on August 28, 1989. On January 30, 1992, Don filed a petition for relief

under Chapter 7 of the Bankruptcy Code. The bankruptcy court entered a discharge order on June 1, 1992 and closed the case on June 11, 1992.

Sometime later, Sandra entered into a contract to sell the property, but a title search revealed the IRS's lien and prevented the sale. Upon Sandra's request, the IRS refused to release the lien. Don then filed a motion to reopen the bankruptcy case on August 14, 1992, and also filed an adversary complaint against the IRS that sought to determine the dischargeability of the federal tax lien. Although the bankruptcy court reopened the case, it determined on January 27, 1993 that it did not have jurisdiction to determine the validity of the government's lien on the Berwyck Property because the property never had become a part of Don's bankruptcy estate. The bankruptcy court thus closed the case for a second time.

The IRS subsequently agreed to release its lien on the property to enable Sandra to sell it. The IRS conditioned its release on the establishment of a non-interest-bearing escrow account containing fifty percent of the proceeds of the sale and subject to the same right, title, and interest that the federal tax lien had on the property. Sandra finally sold the property in June 1992 and received half the proceeds, amounting to $59,944.10.

On April 23, 1993, Sandra filed a complaint pursuant to 28 U.S.C. § 2410(a) in the United States District Court for the Western District of Michigan against the United States, seeking to quiet title to the proceeds in the escrow account. The government asserted in response that the federal tax lien attached to Don's interest in the property, even though Don and Sandra had held the property as tenants by the entirety, and

that it was entitled to half the proceeds from the sale of the property. The government further asserted that Don's conveyance to his wife was fraudulent.

Sandra filed a motion for summary judgment on September 10, 1993, arguing that the completion of the bankruptcy proceedings estopped the government's ability to bring an action for fraudulent conveyance. On September 13, 1993, the government also filed a motion for summary judgment, contending that the federal tax lien had attached to Don's interest in the property.

Following a hearing on the parties' motions on July 21, 1994, the district court issued an opinion and order on September 12, 1994, denying Sandra's motion for summary judgment and granting the government's motion. The district court found that the federal tax lien attached to the property at the time Don and Sandra conveyed the property to Sandra, stating, in essence, that this conveyance effectively: (1) terminated the tenancy by the entirety; (2) after which, each spouse owned an equal one-half interest; and (3) was followed by the conveyance of the property to Sandra. The federal tax lien thus attached at the moment in time that Don possessed a separate one-half interest in the property.

On September 22, 1994, Sandra filed four motions: the first sought either to amend the judgment to include the conclusions of law supporting denial of her motion for judgment against the government's action for fraudulent conveyance, or, in the alternative, a new trial; the second sought to amend the judgment to include a determination of the value of Don's interest in the property on the date when Don and Sandra terminated the tenancy by the entirety; the third sought to refer the case to the bankruptcy court for it to make

this determination; and, the fourth sought to stay execution of the judgment pending resolution of the other motions.

The district court entered another opinion and order on November 17, 1994, denying Sandra's first motion and stating that, having resolved the matter on other grounds, it did not need to decide whether a fraudulent conveyance had occurred. However, the court granted Sandra's second motion, concluding that further proceedings were necessary to determine the value of Don's interest at the time of the termination of his joint tenancy. Still, the court found that it, and not the bankruptcy court, was the proper forum to make this determination and thus denied Sandra's third motion. Finally, the court granted Sandra's fourth motion and stayed execution of the judgment.

Following a telephonic hearing on September 11, 1995, the district court issued an opinion on October 26, 1995, finding that the government held a valid lien on the interest Don held in the property on August 28, 1989—the date of the termination of the entireties estate and the subsequent conveyance to Sandra. The parties stipulated that the property had a fair market value of $120,000 and an outstanding mortgage balance of $19,412.12 on August 28, 1989. The district court thus determined that Don's interest in the property at the time of the conveyance was $50,293.94 and entered a final judgment awarding the government this amount.

Sandra timely filed her appeal on December 22, 1995. The government timely filed its notice of cross-appeal on December 26, 1995.

II.

We review de novo a district court's grant of summary judgment. *Harrow Prods., Inc. v. Liberty Mutual Ins. Co.*, 64 F.3d 1015 (6th Cir.1995); *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir.1995). Summary judgment is appropriate if the record shows "that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We assess the record in the light most favorable to the non-movant, drawing all reasonable inferences in its favor. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986).

III.

A.

The Internal Revenue Code provides for the creation of a federal tax lien on a taxpayer's property, stating that: "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321. Under the succeeding section, the Code further provides that the lien generally arises when the assessment is made, and it continues until the taxpayer's liability "is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. § 6322.

Federal tax law "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States v. Bess*, 357 U.S. 51, 55, 78 S. Ct. 1054, 1057, 2 L.Ed.2d 1135 (1958). Thus, in order to determine whether property is subject to a federal tax lien, "'state law controls in

determining the nature of the legal interest which the taxpayer had in the property.' "*Aquilino v. United States*, 363 U.S. 509, 513, 80 S. Ct. 1277, 1280, 4 L.Ed.2d 1365 (1960) (quoting *Morgan v. Commissioner*, 309 U.S. 78, 82, 60 S. Ct. 424, 426, 84 L.Ed. 585 (1940)). "'[O]nce it has been determined that state law creates sufficient interest in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law." *United States v. National Bank of Commerce*, 472 U.S. 713, 722, 105 S. Ct. 2919, 2925, 86 L.Ed.2d 565 (1985) (quoting *Bess*, 357 U.S. at 56-57, 78 S. Ct. at 1057- 58). Under federal tax law, the government's tax liens attach to every interest in property a taxpayer might have, regardless of whether that interest is less than full ownership or is only one among several claims of ownership. *United States v. Safeco Ins. Co. of America, Inc.*, 870 F.2d 338, 341 (6th Cir.1989) (citing *National Bank of Commerce*, 472 U.S. at 725, 730, 105 S. Ct. at 2926-27, 2929).

B.

In the present case, Sandra and her husband held the Berwyck Property as tenants by the entirety. Under Michigan law, a tenancy by the entirety can be held only by a husband and wife, who possess an interest in the property under single title with a right of survivorship. *See Sanford v. Bertrau*, 204 Mich. 244, 169 N.W. 880 (1918); *Matter of Grosslight*, 757 F.2d 773, 775 (6th Cir.1985). In Michigan, a tenancy by the entirety can be created only by a written instrument of conveyance, which produces unity of persons, time, title, interest, and possession. *See Rogers v. Rogers*, 136 Mich. App.125, 356 N.W.2d 288, 292-93 (1984). Neither

husband nor wife acting alone can alienate any interest in the property, nor can creditors of one spouse levy upon the property. *See Grosslight*, 757 F.2d at 773. Further, creditors of one spouse cannot reach that spouse's share of proceeds from a foreclosure sale of an entireties property. *See Muskegon Lumber & Fuel Co. v. Johnson*, 338 Mich. 655, 62 N.W.2d 619, 623 (1954). If a marriage terminates in divorce, however, Michigan law converts an entireties estate into a tenancy in common by operation of statute. *See* M.C.L.A. § 552.102; *United States v. Certain Real Property Located at 2525 Leroy Lane*, 910 F.2d 343, 351 (6th Cir.1990) (*"Leroy Lane I")*. Husband and wife can also terminate an entireties estate by joint conveyance of the property by husband and wife. *See Leroy Lane I*, 910 F.2d at 351.

Although the government may levy entireties property for nonpayment of real estate taxes on the real property itself under Michigan law, *see, e.g., Robbins v. Barron*, 32 Mich. 36 (1875), we have held that the federal government may not, under Michigan law, attach a lien to the entireties property to satisfy the personal tax liability of a single spouse. *See Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971). In *Cole*, the IRS filed a lien against property held by a husband and wife as tenants by the entirety for unpaid tax assessments against the husband. *See id.* at 1338. We held that:

> the federal tax lien does not attach to the subject property owned by [a husband] and [wife] by the entirety, because the Government's tax lien is against [the husband] only. If the lien constitutes a cloud on the title to the property, [husband and wife] are therefore entitled to have the lien declared a nullity as to the property.

Id. at 1343. In *Cole*, we concluded that "the lien is without legal effect as it pertains to [the husband's and wife's] house." *Id.* at 1344.

After *Cole*, we had occasion to consider again the entireties estate under Michigan law in *Leroy Lane I*. *See* 910 F.2d at 343. In that case, the United States seized entireties property under a criminal forfeiture statute; however, the district court awarded all the proceeds from the forced sale of the property to the innocent spouse. *See id.* at 344. On appeal, we found that the government's position with respect to the forfeiture was most analogous to the position of a judgment creditor of one spouse. *See id.* at 351. In discussing the entireties estate, we reiterated that "entireties property may not be attached to satisfy the personal tax liability of a single spouse," *id.* at 350 (citing *Cole*, 441 F.2d at 1343), and noted that the innocent spouse had "not only an indivisible interest in the entireties property, but also a survivorship interest which would entitle her to sole ownership of the property upon her husband's death." *Id.* at 347.

Upon remand, the district court, having discovered that the couple divorced, again awarded all the proceeds to the innocent spouse based on the division of property as set out in the divorce decree. *See United States v. Certain Real Property Located at 2525 Leroy Lane*, 972 F.2d 136, 137 (6th Cir.1992) ("*Leroy Lane II*"). In *Leroy Lane II*, we again reiterated that, under Michigan law, a judgment creditor cannot levy against the entireties estate to satisfy one spouse's debt and further noted that the government's interest does not come into being until the entireties estate is destroyed. *See* 972 F.2d at 138. We thus held that the government was entitled only to whatever interest the debtor-

spouse held after the entireties estate was destroyed; in *Leroy Lane II*, that was a zero amount because the debtor- spouse received no interest in the property pursuant to the divorce decree.[1] *See id.*

C.

Turning to the present case, Sandra argues on appeal that *Cole* remains controlling authority and that because Michigan substantive real property law has not changed, the IRS's tax lien could not attach to Don's interest in the Berwyck Property. It was error, Sandra continues, for the district court to find that the lien attached because it was a nullity as to the entireties property. Thus, Sandra disputes the district court's finding that upon the joint conveyance of the Berwyck Property to Sandra, the tenancy by the entirety was terminated and Don—for a moment in time—owned a one-half interest in the property to which the lien could attach.

The United States, on the other hand, goes a step further than the district court, contending that the lien attached to the Berwyck Property at the time the lien arose. In so arguing, the United States relies on two Supreme Court decisions in which the federal government's interests have trumped state law. *See United States v. Irvine*, 511 U.S. 224, 114 S. Ct. 1473, 128 L.Ed.2d 168 (1994); *United States v. Rodgers*, 461 U.S. 677, 103 S. Ct. 2132, 76 L.Ed.2d 236 (1983).

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1 We nonetheless voiced concern about the United States' lack of opportunity to assert its entireties interest prior to the Michigan Circuit Court's grant of the divorce and remanded the case for such evidence as was necessary to insure total disclosure to the Michigan Circuit Court. *See Leroy Lane II*, 972 F.2d at 138.

The United States cites *Irvine* for the proposition that federal laws cannot be avoided or "struck blind" by state-law legal fictions. 511 U.S. at 240, 114 S. Ct. at 1482. *Irvine* addressed the issue of whether a taxpayer's disclaimer of her remainder interest in a trust—which caused her interest to be distributed to her children—resulted in a taxable gift. *See id.* The taxpayer argued that under Minnesota law, an effective disclaimer was valid ab initio, as if the disclaiming party never owned the property; thus, there was no taxable transfer. *See id.* at 227-28, 114 S. Ct. at 1475-76. The Supreme Court disagreed. In citing *Irvine*,the government thus contends that Michigan's recognition of the entireties estate—like Minnesota's disclaimer—is invalid because it is a legal fiction that facilitates the circumvention of federal tax laws.

In *Rodgers*, a case also cited by the government, the Court held that homestead rights under Texas law did not protect property—or a nondelinquent spouse—from in rem proceedings under 26 U.S.C. § 7403. *See* 461 U.S. at 692-700, 103 S. Ct. at 2142-46. The Court based its ruling on a broad interpretation of the tax laws, which permitted the government to "subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." *Id.* at 692, 103 S. Ct. at 2142. The Court did, however, formulate a mechanism whereby the nondelinquent spouse would be compensated. *See id.* at 710-11, 103 S. Ct. at 2151-52. Moreover, the Court recognized that tenancies by the entirety posed a problem distinct from that of homestead estates, in that neither spouse owns an independent interest in an entireties property while both spouses own independent interests in a homestead estate. *See id.* at 702 n. 31, 103 S. Ct. at 2147 n. 31.

We are not persuaded that the Supreme Court decisions cited by the United States have any effect whatsoever on the government's ability to attach a lien to an entireties estate, because these cases do not alter the basic tenet that state law governs the issue of whether any property interests exist in the first place. *See id.* at 683, 103 S. Ct. at 2137. *Irvine* and *Rodgers* stand for the proposition that once a property interest exists under state law, state law cannot interfere with attachment of a lien to that property interest—a matter that is governed by federal law. *See id. Irvine* and *Rodgers* do not support the proposition that federal law can be used to trump a state's definition of a property interest.

In Michigan, it is well established that one spouse does not possess a separate interest in an entireties property. *See, e.g., Rogers*, 356 N.W.2d at 292-93. This principle of Michigan law has not been overruled by Michigan courts, nor trumped by federal law, despite the United States' arguments to the contrary. Because Michigan law does not recognize one spouse's separate interest in an entireties estate, a federal tax lien against one spouse cannot attach to property held by that spouse as an entireties estate.

D.

In the alternative, the government argues—and the district court held—that upon the conveyance of the Berwyck Property to Sandra, the entireties estate terminated and Don, for a transitory moment, had an undivided one-half interest in the property, to which the lien could attach.

Although the entireties estate was terminated upon conveyance of the Berwyck Property to Sandra, Don's interest in the property terminated at the same time. We are unaware of any precedent indicating that an entireties estate is automatically transformed into a tenancy in common as an intermediary step in the conveyance of the property. To the contrary, it is clear that at the time the entireties estate terminated, Sandra was vested "with full and complete title." *Hearns*, 53 N.W.2d at 320. Thus, Don never held an interest in the Berwyck Property to which the United States' lien could attach.

E.

Despite our conclusion that the IRS lien could not attach to the entireties property per se, an issue remains regarding whether the lien attached to any inchoate interest that Don possessed in the entireties property. It is axiomatic that a federal tax lien can attach to "rights to property" as well as to the property itself. *See, e.g., National Bank of Commerce*, 472 U.S. at 730, 105 S. Ct. at 2929. It follows that a federal tax lien can attach to a future or contingent interest in property. *See, e.g., Safeco Ins. Co.*, 870 F.2d at 341. Although federal law controls whether an interest constitutes such a "right to property," *see National Bank of Commerce*, 472 U.S. at 727, 105 S. Ct. at 2933 (citation omitted), state law determines the nature of the legal interest which a taxpayer has in a property. *See Aquilino*, 363 U.S. at 513, 80 S. Ct. at 1280. Under federal law, then, any separate future interest that Don had in the Berwyck Property would be subject to attachment; however, the nature of that interest must be determined by Michigan law.

Michigan law does not recognize a severable future interest held by one spouse in an entireties property. *See Sanford v. Bertrau*, 204 Mich. 244, 169 N.W. 880, 881 (1918) ("We think the better doctrine is that the right of survivorship is merely an incident of an estate by entirety, and does not constitute a remainder, either vested or contingent."); *see also Budwit v. Herr*, 339 Mich. 265, 63 N.W.2d 841, 844 (1954) (citing *Sanford*, 169 N.W. at 881). *But see Leroy Lane I*, 910 F.2d at 352 ("[W]e have found no cases which would preclude the attachment of a creditor's lien on one spouse's interest which could be satisfied to the extent of that spouse's interest upon the termination of the entireties estate."). Although statements in *Leroy Lane I* arguably might be construed to indicate the existence of a future interest subject to attachment in an entireties estate, *see Fischre* v. *United States*, 852 F. Supp. 628, 630 (W.D. Mich. 1994), we are bound to define Don's future interests in the Berwyck Property under Michigan law. *See Aquilino*, 363 U.S. at 513, 80 S. Ct. at 1280. Michigan law, as set out by the Michigan Supreme Court in *Sanford*, has never been overruled. Accordingly, under Michigan law, Don did not possess a separate future interest in the Berwyck Property; therefore, the federal tax lien could not attach to a future interest that did not exist under Michigan law.

IV.

Despite the fact that the tax lien did not attach to the Berwyck Property, there remains an issue of whether a fraudulent conveyance occurred in this case, an issue that the district court did not address. Under Michigan law, one spouse cannot use the doctrine of tenancy by the entirety to defeat the rights of a judgment creditor.

See McCaslin v. Schouten, 294 Mich. 180, 292 N.W. 696, 698 (1940); *Morris v. Wolfe*, 48 Mich. App. 40, 210 N.W.2d 16, 17 (1973). Such a fraudulent transfer can be set aside. *See* Mich. Comp. Laws § 566.19(1).

The issue of whether a fraudulent conveyance occurred in this case is a matter that should be determined by the district court. If the conveyance was fraudulent and therefore set aside, the IRS could be entitled to half the proceeds of the June 1992 sale, or $59,944.10. Accordingly, upon remand, the district court should consider whether the Berwyck Property was transferred for fraudulent purposes.

V.

For the foregoing reasons, we **REVERSE** the district court's grant of summary judgment in favor of the United States, in which the district court determined that the United States' tax lien attached to entireties property at the time that Sandra and Don Craft conveyed the property to Sandra, and **REMAND** to the district court for further proceedings in accordance with this opinion.

RYAN, Circuit Judge, concurring.

In my judgment, there can be no doubt that Don Craft had valuable property interests in the 2656 Berwyck Road home and that he ceded those interests for little or no consideration, most likely intending to defeat the IRS lien at issue here. Binding authority, sound reasoning, and equitable principles require that the IRS be awarded *some* portion of the proceeds of the sale of the 2656 Berwyck home if Don Craft paid for entirety property instead of paying his taxes, and then transferred his interest in the property to his wife to avoid the consequences of his tax delinquency. I agree with the majority that summary judgment should not have been granted and that this case should be remanded for further proceedings; however, the remand should be for the sole purpose of determining whether Don Craft's conduct was fraudulent.

I.

The majority relies on *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971), in holding that "a federal tax lien cannot attach to property held as a tenancy by the entirety," and thus that the IRS could have no interest in the Berwyck home. However, binding cases decided since 1971 clearly state a different doctrine: (1) state property law determines which rights, in the bundle of rights we call "property," a person may exercise; (2) an IRS lien attaches to *all* those rights; (3) and state-law "fictions" cannot serve to defeat a valid lien. In this case, Don Craft had a contingent remainder. He had a right to the entire Berwyck property if his wife predeceased him, and he had a right to half the proceeds of the sale or lease of the home if the property were ever sold or leased. Although Don Craft did not have the

whole bundle of property rights, it cannot be denied that he had some of them. And, most assuredly, the IRS could attach these rights.

Pursuant to the Internal Revenue Code, the IRS *must* attach a tax lien to all property or rights to property, real or personal, of any person who neglects or refuses to pay his income tax after demand. *See* 26 U.S.C. § 6321. As the Supreme Court has noted, Congress intended by this provision "to reach every interest in property that a taxpayer might have." *United States v. National Bank of Commerce*, 472 U.S. 713, 720, 105 S. Ct. 2919, 2924, 86 L.Ed.2d 565 (1985). In fact, "'[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes.'" *Id.* at 720, 105 S. Ct. at 2924 (citation omitted). Although state law must be relied on in determining what constitutes "property or rights to property" attachable by the IRS, this is hardly surprising considering the fact that there is no federal law of property. *See United States v. Certain Real Property Located at 2525 Leroy Lane*, 910 F.2d 343, 347, 351 (6th Cir. 1990) (*Leroy I*). It also should be no surprise that state-law doctrines that would prevent ordinary creditors from reaching state-defined interests cannot prevent a federal tax lien from attaching. *See United States v. Irvine*, 511 U.S. 224, 240, 114 S. Ct. 1473, 1482, 128 L.Ed.2d 168 (1994); *National Bank of Commerce*, 472 U.S. at 727, 105 S. Ct. at 2927-28; *United States v. Mitchell*, 403 U.S. 190, 205, 91 S. Ct. 1763, 1771-72, 29 L.Ed.2d 406 (1971).

Thus, the first question in this case should be: what state-defined rights, if any, did Don Craft have in the Berwyck property? Under Michigan law, he had the rights to use and enjoy the property in tandem with

Sandra Craft, to exclude all others from the property save Sandra Craft, to share equally in the proceeds of any lease or sale of the home, and to receive the entire estate upon the death of Sandra Craft. *See* Mich. Comp. Laws § 557.71; *Rogers v. Rogers*, 136 Mich. App. 125, 356 N.W.2d 288, 293 (1984). The majority implicitly acknowledges that Don Craft had individual rights when it states that "a husband can convey *his interest* to his wife." (Emphasis added.)

However, it does appear that a federal tax lien only attaches to *exclusive* rights in property held by a delinquent taxpayer. *See* (*Leroy I*), 910 F.2d at 351. In other words, where a delinquent taxpayer cannot exclusively exercise any of the incidents of property ownership, he has nothing to attach. The only rights exclusively held by Don Craft were future interests—the right to share in future proceeds and right of survivorship.

Arguably, Don Craft did not have the right to sell or encumber either of these interests, and therefore did not truly possess anything of value for the IRS to attach. Several Michigan cases state or imply that one spouse has *no* alienable or encumberable interest in entirety property, including future interests. *See Budwit v. Herr*, 339 Mich. 265, 63 N.W.2d 841, 844 (1954); *Zeigen v. Roiser*, 200 Mich. 328, 166 N.W. 886, 890 (1918); *Bauer v. Long*, 147 Mich. 351, 110 N.W. 1059, 1060 (1907); *Tamplin v. Tamplin*, 163 Mich. App. 1, 413 N.W.2d 713, 715 (1987). However, the proposition that a spouse's future interest is inalienable does not appear to have ever been the rule of decision in any case decided by Michigan courts. For instance, in all four cases cited above, the interest at issue was the *present right* to title in the property, not a future interest, and thus

insofar as the language could be read broadly to preclude separate future contingent interests, it is *dicta*. Additionally, even if Michigan law forbids the alienation or encumbrance of one spouse's contingent interest, this merely lessens the *value* of that interest, it does not necessarily make the interest worthless. That is, even an inalienable contingent interest is likely to have some value. Thus, I am not confident that a spouse's future interest in a tenancy by the entirety is truly unencumberable, and even if it is, this still does not mean that the spouse has no valuable interest that may be attached under federal tax law.

This conclusion is required, I think, by *Bank One Ohio Trust Co. v. United States*, 80 F.3d 173 (6th Cir. 1996), which indicates that inalienability is *immaterial* in determining whether a federal tax lien can attach to property rights. There, despite the fact that the Ohio Supreme Court had declared that a trust beneficiary "does not have *any interest* in [a spendthrift trust such as the one in *Bank One*] because the settlor did not give the beneficiary an interest," *Domo v. McCarthy*, 66 Ohio St. 3d 312, 612 N.E.2d 706, 709 (1993) (emphasis added), and despite the fact that the trust was neither alienable or encumberable, this court held that the IRS could attach the income from the trust because the delinquent beneficiary *did* have an interest in the trust despite its inalienability. *Bank One*, 80 F.3d at 176. As we noted:

> R]estraints on alienation are not effective to prevent a federal tax lien from attaching. . . .
>
> . . . Thus when Congress says, as it has done in § 6321, that an unpaid tax "shall" constitute a lien upon "all" of a delinquent taxpayer's property or rights to property, it follows that the tax is a lien both on property that is alienable under state law and on property that is not.

Id.

Similarly, in *Leroy Lane I*, 910 F.2d 343, this court held that, although the federal government could not attach an entirety estate, the government would be entitled to the property if the innocent spouse predeceased the debtor spouse or if the marital estate was otherwise "terminated by dissolution of the marriage or joint conveyance." *Id.* at 351. In effect, then, the government in *Leroy Lane I* had a lien on the debtor spouse's contingent remainder. Thus, regardless whether Don Craft could alienate his contingent remainder pursuant to Michigan law, under federal tax law the IRS lien attached to it in 1989. This future interest was a "right[ ] to property" as defined by Michigan law, and attachable as provided by federal law.

Michigan's legal fictions, revered as they are—that husband and wife are one entity and that neither has any separate interest in a tenancy by the entirety—cannot alter this outcome. As the Supreme Court has made clear, such state-law fictions, while they are perhaps valid defenses against state-law creditors, have no effect on an IRS lien. For example, in *National Bank of Commerce*, the fact that no Arkansas creditor could reach funds of a taxpayer-debtor that were held in a joint account with other nondebtor individuals did not prevent the IRS from attaching the entire account. *See* 472 U.S. at 726, 105 S. Ct. at 2927. The Court determined that the taxpayer's unconditional and unilateral right to withdraw money from the joint bank account

was "property" or a "right[ ] to property" *for purposes of section 6331(a)* of the I.R.C. (a section analogous to 6321). *Id.* at 725-26, 105 S. Ct. at 2926-27. Thus, since the taxpayer could at any time withdraw *all* the money from the account without permission from the joint account holders, the IRS could likewise levy the entire account. Again, state law determines the practical incidents of certain types of ownership, but the state-law consequences of those determinations vis—vis creditors are of no concern in the application of federal tax law. *See id.* at 723, 105 S. Ct. at 2925-26.

Although the majority disagrees, I am satisfied that *United States v. Irvine*, 511 U.S. 224, 114 S. Ct. 1473, 128 L.Ed.2d 168 (1994), also undermines Sandra Craft's position. In *Irvine*, the Court reiterated that legal fictions—although valid protection from creditors under state law—could not be used to avoid federal tax liabilities. There, the taxpayer was the beneficiary of a trust established by her grandfather in 1917. *Id.* at 226, 114 S. Ct. at 1475. The income from the trust was to go to the taxpayer's grandmother and her aunts and uncles (the settlor's wife and children). Upon the death of the last of these primary beneficiaries, the trust was to terminate and the funds were to be divided among the surviving grandchildren, including the taxpayer, Sally Irvine. *Id.* at 227, 114 S. Ct. at 1475-76. After the trust terminated, but before its assets were distributed, Irvine disclaimed her interest in favor of her children. Such disclaimers were valid under state law, and had the effect of removing the disclaiming party from the transaction altogether, *id.* at 239-40, 114 S. Ct. at 1481-82; thus, state law deemed the transfer to be directly from Irvine's grandfather to her children. *Id.*

The I.R.C. section in question taxed "all gratuitous transfers, by whatever means, of *property* and *property rights* of significant value." *Id.* at 233, 114 S. Ct. at 1478 (emphasis added). An exception existed for disclaimed interests in property if the disclaimer was effective under local law and made within a reasonable time after knowledge of the existence of the transfer. *Id.* The IRS claimed that the transfer from Irvine to her children was subject to the gift tax because it was not made within a reasonable time after her knowledge of her interest in the estate. *Id.* at 229, 114 S. Ct. at 1476. The Court held that the 47-year delay in disclaiming her interest was not reasonable, and thus upheld the denial of Irvine's request for a refund. *Id.* at 235-36, 114 S. Ct. at 1479-80.

Significantly, the Court rejected Irvine's argument that her disclaimer related back to the moment of the original transfer of the interest to her as provided by state law. *Id.* at 239, 114 S. Ct. at 1481-82. This "legal fiction" implemented the state's policy to defeat the claims of the disclaimer's creditors. *Id.* at 240, 114 S. Ct. at 1482. However, the state-law rationale for this legal fiction provided no justification vis—vis the federal gift tax, which was meant to curb estate-tax abuse. *Id.* "Since the reasons for defeating a disclaimant's creditors would furnish no reasons for defeating the gift tax as well, . . . Congress [must not have intended] to incorporate state law fictions as touchstones of taxability when it enacted the Act." *Id.*

Nothing in the majority opinion distinguishes *Irvine* or *National Bank of Commerce*. Nor does the majority address cases previously decided by this court, such as *Bavely v. United States (In re Terwilliger's Catering Plus, Inc.)*, 911 F.2d 1168, 1171 (6th Cir. 1990) and

United States v. Safeco Insurance Co., 870 F.2d 338, 341 (6th Cir. 1989), which support the above analysis. Michigan's tenancy by the entirety doctrine serves to protect the marital home from being compromised to satisfy the debts of one spouse. This rationale does not furnish any reason to defeat the federal tax code when the operation of the I.R.C. will not terminate the entirety estate. Although the majority argues that an IRS lien on one spouse's future interest will place a cloud on the title to the marital home, even this would not interfere with the couple's use and enjoyment of their property. And, even if the possible detrimental effect of the IRS lien on the couple's ability to sell their home were an appropriate consideration here, I believe that a properly filed lien, identifying only the delinquent taxpayer's interest and giving no indication of joint liability for the debt, sufficiently mitigates this possibility. Moreover, the adverse effect of allowing a lien on one spouse's future interest is further lessened by the fact that, in Michigan, it appears that creditors may not reach the proceeds of the sale of entirety property if the married couple immediately reinvests the proceeds in new entirety property. *See Muskegon Lumber & Fuel Co. v. Johnson*, 338 Mich. 655, 62 N.W.2d 619, 622 (1954).

II.

Thus, on March 30, 1989, when the IRS filed its lien on all of Don Craft's property and rights to property, it acquired a lien on his future interest in the Berwyck home. More importantly, the August 28, 1989, transfer of the property to Sandra Craft did not extinguish the IRS's lien on this contingent remainder. Under Michigan law, one spouse cannot use the doctrine of

tenancy by the entirety to defeat the rights of a judgment creditor. For instance, in *McCaslin v. Schouten*, 294 Mich. 180, 292 N.W. 696, 698 (1940), Mr. Schouten had been adjudged liable to a bank for $10,000. Evidence indicated that he had used $8104 of this money to pay the mortgage on the marital estate. The bank sought a lien on the tenancy by the entirety, because Mr. Schouten was insolvent, and no other means of recovery could be effected. The Michigan Supreme Court granted the lien, reasoning:

> Being insolvent at the time and indebted to the bank, in so far as Mr. Schouten invested or used his individual funds to pay the mortgaged debt on the entireties property and thereby placed or attempted to place his individual property beyond the reach of his creditors, the transaction constituted a fraud in law . . . .
>
> . . . .
>
> . . . The debtor might be satisfied to give his assets to a stranger or to exchange them for some worthless chattel. But the law will not permit him to do so if he thereby renders himself uncollectible to the detriment of his creditors.

Id., 292 N.W. at 699.

The court rejected Mrs. Schouten's contention that her entirety estate should not be disturbed by a forced sale in light of the fact that she was innocent of any fraud, finding that "to so hold would enable her to benefit by Mr. Schouten's wrongful use of his individual funds." *Id.*, 292 N.W. at 700. Thus, the bank was awarded $5504—the amount by which the Schoutens'

equity in the tenancy increased as the result of Mr. Schouten's wrongful use of funds he owed the bank. *Id.*

Similarly, the Michigan Court of Appeals has recently reiterated this holding on essentially the same facts. *See Miller v. Irwin*, 190 Mich.App. 610, 476 N.W.2d 632 (1991). As in *Schouten*, Mr. Irwin failed to satisfy a judgment against him, and the creditor attempted to attach the marital estate of Mr. and Mrs. Irwin. Michigan Compiled Laws § 566.19(1) provides that a creditor may set aside any fraudulent conveyance to the extent necessary to satisfy his claim. The *Miller* court relied on this provision in ruling that mortgage payments on the entirety estate made after the judgment of indebtedness, to the extent that they increased the Irwins' equity in the property, would entitle the creditors—the Millers—to a lien on the property. *Id.*, 476 N.W.2d at 635.

III.

These cases make clear, at least to me, that if the transfer to Sandra Craft was made with the intent to place Don Craft's monies beyond the reach of the IRS, the federal government is entitled to set aside the conveyance and execute its lien. *See* Mich. Comp. Laws § 566.19(1); *McCaslin*, 292 N.W. at 700. However, the critical factual point has not been settled—the district court rested on alternative reasoning and did not need to discuss fraud. However, the facts that Don Craft conveyed his interest shortly after the IRS recorded its lien, that he received only one dollar in consideration for the transfer, and that the grantee was Sandra Craft instead of some disinterested party, are certainly sufficient to raise the inference that the transaction was

fraudulent. *See Farrell v. Paulus*, 309 Mich. 441, 15 N.W.2d 700, 704 (1944).

If the transfer is set aside, then the IRS maintains its lien on Don Craft's future interest. Of course, the property was sold and his future right to half of the proceeds became a present interest in June 1992. I agree with the majority that, if the transfer is set aside, the IRS would be entitled to half of the proceeds of the June 1992 sale, or $59,944.10, plus interest. The fact that the IRS agreed that its interest in the escrowed funds would extend no further than its interest in the home itself is irrelevant. If the transfer to Sandra Craft was fraudulent, *McCaslin v. Schouten* authorizes a forced sale of the marital property. *See* 292 N.W. at 700. If the IRS could force a sale in order to enforce its lien, surely it must be able to take an equal amount when the sale has been consummated without compulsion.

IV.

For the foregoing reasons, I concur in the result reached by the majority only because the summary judgment entered in favor of the IRS must be reversed. The majority opinion, erroneously I believe, denies that Don Craft had a separate, attachable, future interest in the tenancy by the entirety. This holding not only contravenes established precedent, but provides an avenue for easy avoidance of federal income-tax laws. Respectfully, we are bound to reject this result.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:93-CV-306

SANDRA L. CRAFT, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ACTING THROUGH THE INTERNAL REVENUE SERVICE, DEFENDANT

[Filed: Mar. 30, 1999]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before: QUIST, District Judge.

Background

Plaintiff, Sandra L. Craft ("Sandra"), filed this action seeking to quiet title to the proceeds of the sale of certain real property located at 2656 Berwyck Road in Grand Rapids, Michigan (the "Berwyck Property"), which Plaintiff had owned with her husband, Don Craft ("Don") as tenants by the entireties. Specifically, Plaintiff alleged that a tax lien filed by the Internal Revenue Service ("IRS" or "Government") for taxes owed by Don did not attach to the Berwyck Property while Sandra and Don owned it as tenants by the entireties or when Don terminated the entireties estate by delivering a quitclaim deed to Sandra on August 28, 1989. Sandra filed a motion for summary judgment on September 10, 1993, in which she argued that the

Government was precluded from maintaining a fraudulent conveyance action on the grounds that Don had been discharged from his debts in bankruptcy. The Government also moved for summary judgment on Sandra's claim, contending that its lien did attach to Don's interest in the Berwyck Property. On September 12, 1994, this Court issued an Opinion and Order denying Sandra's motion for summary judgment and granting the Government's motion for summary judgment on the basis that the IRS's lien attached in the interval of time between Don's termination of the entireties and his conveyance of his interest to Sandra.

On November 17, 1994, the Court issued another Opinion and Order which granted two and denied two of four motions filed by Sandra on September 22, 1994. In particular, the Court granted Sandra's motion to determine the value of Don's interest at the time of the termination of the joint tenancy and her motion for stay of execution of the judgment, and denied her motions to amend the judgment to include its findings supporting denial of her motion on the Government's fraudulent conveyance claim and to refer the case to the bankruptcy court for determination of the value of Don's interest. On October 26, 1995, the Court issued an Opinion and Final Judgment in which it found that the value of Don's interest in the property at the time of the conveyance was $50,293.94.

Sandra appealed the September 12, 1994, Order granting summary judgment in favor of the Government. The Sixth Circuit reversed the Order on the grounds that the lien could not have attached to the entireties interest under Michigan law and that the entireties estate was not "transformed into a tenancy in common as an intermediary step in the conveyance of

the property" to which the lien could have attached. *See Craft v. United States*, 140 F.3d 638, 643-44 (6th Cir. 1998). In addition, the Sixth Circuit held that Don did not possess a separate future interest in the Berwyck Property to which the lien could have attached. *See id.* at 644. Thus, the Sixth Circuit effectively held that Sandra prevailed on her complaint to quiet title. However, the court found that "[d]espite the fact that the tax lien did not attach to the Berwyck Property, there remains an issue of whether a fraudulent conveyance occurred in this case. . . ." *Id.* Accordingly, the court remanded the case for determination of the fraudulent conveyance issue. On December 1, 1998, the Court conducted a bench trial on the fraudulent conveyance issue. The Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a) are set forth below.

I. *Findings of Fact*[1]

Sandra and Don purchased the Berwyck Property on May 26, 1972, as tenants by the entireties for $48,000. In connection with the purchase, Don and Sandra obtained a mortgage in the amount of $37,000. Don, a practicing attorney, failed to timely file federal income tax returns for his taxable years 1979 through 1987. As a result, the IRS filed substitute income tax returns for Don pursuant to 26 U.S.C. § 6020(b). In 1988, the IRS assessed Don's tax liabilities in the amount of $482,446.73. On March 30, 1989, the IRS filed a Notice of Federal Tax Lien against all of Don's property with the Register of Deeds for Kent County, Michigan.

[1] Any finding of fact that is a conclusion of law shall be considered as such.

As of April 15, 1980, the date on which the Government's claim for unpaid taxes first accrued, the fair market value of the Berwyck Property was $62,000 and the outstanding balance on the mortgage was $31,628.95, leaving Don and Sandra with net equity in the property of about $31,000. From 1979 to 1985, Don and Sandra made timely payments on their mortgage in the total amount of $19,692, which consisted of $12,999 in interest and $6,693 in principal. As a result, the mortgage balance was reduced to $25,301.05 by January 1, 1986. During the same period, Don and Sandra paid approximately $17,000 in real property taxes. After January 1, 1986, Sandra paid all of the mortgage and tax payments with her own money.

On July 28, 1988, the IRS assessed Don tax for the years 1979 through 1985 in the amount of $168,264.90. The final tax included deductions for all mortgage interest and property tax payments made by Don and Sandra from 1979 to 1985.[2] On March 30, 1989, the IRS

[2] In her response to the Government's post-trial brief, Sandra argued that the Government failed to show that Don was allowed to deduct all mortgage interest and property tax payments because the initial tax figures prepared by IRS Revenue Agent Rosie Wilson ("Wilson"), which substantiated only a portion of the property tax and mortgage interest deductions, were the same as the final assessment. Sandra contends that the lack of difference between the initial and final numbers shows that Don was not allowed any deductions other than those substantiated in the initial figures prepared by Ms. Wilson. However, the fact that a greater amount of property tax or mortgage interest deductions was not substantiated does not mean that those deductions were not taken into account by Ms. Wilson in preparation of the initial figures. Ms. Wilson testified that her work papers containing the initial figures were not complete because she had not completed her investigation. Furthermore, there is no indication that Ms. Wilson did not take into account the entire amount of all claimed deductions at the

filed a Notice of Federal Tax Lien against Don in the amount of $482,446. On August 28, 1989, Don conveyed his interest in the Berwyck Property to Sandra by quit claim deed for the sum of $1.00. During the period of April 15, 1980 through August 28, 1989, Don was insolvent.

Don filed a petition for relief under Chapter 7 of the Bankruptcy Code on January 30, 1992. The bankruptcy court entered an order of discharge on June 1, 1992, and the bankruptcy case was closed on June 11, 1992. In June 1992, the Berwyck Property was sold, yielding net proceeds of $119,888.20, after payment of the mortgage. Pursuant to an agreement between the parties, one-half of the net proceeds were distributed to Sandra, and the balance of the proceeds were deposited into an escrow pending a resolution of the dispute of the IRS lien. Don died on August 17, 1998.

II. *Conclusions of Law*[3]

The issue presented for determination by the Court is whether the conveyance from Don to Sandra on August 28, 1989, constituted a fraudulent conveyance under Michigan's Uniform Fraudulent Conveyance Act ("Fraudulent Conveyance Act"), M.C.L. §§ 566.11 to 566.23. Prior to trial, the Government also raised in its trial brief, for the first time, the issue of whether the conveyance was fraudulent to the extent that Don

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time she prepared her initial figures. Finally, Ms. Wilson testified that Don was allowed to deduct all mortgage and property tax payments and the Government demonstrated that Sandra did not claim any mortgage interest or property tax deductions on her separate returns.

[3] Any conclusion of law that is a finding of fact shall be considered as such.

enhanced the entireties property by paying both the property tax and mortgage payments from 1979 to 1985 while he was insolvent. Apart from her arguments on the merits, Sandra asserts that the Government's claim is not properly before the Court for various reasons. The Court will address these arguments first.

A. Procedural and Limitations Issues

The Government raised its fraudulent conveyance argument as an affirmative defense in its answer to Sandra's complaint. Sandra contends that the Government cannot assert a fraudulent conveyance claim because it has not filed a complaint or a counterclaim. In addition, Sandra contends that the Government cannot now cure this omission by moving to amend its answer to file a counterclaim because the Government was required to assert any such counterclaim in its answer. Sandra also contends that any counterclaim would be barred by the statute of limitations.

Sandra has not cited any authority to support her proposition that when fraudulent conveyance is raised to defeat a quiet title claim it may only be asserted as a counterclaim and not as an affirmative defense. In fact, courts have allowed fraudulent conveyance to be raised as an affirmative defense to quiet title claims. *See, e.g., Snyder v. United States*, No. 88-CV-2136 (RR), 1995 WL 724529, at *13 (E.D.N.Y. July 26, 1995) (denying the plaintiff's motion to strike the Government's affirmative defense of fraudulent conveyance to the plaintiff's quiet title action); *Buffalo Valley Golf Club Partnership v. United States*, No. 2:93-CV-172, 1994 WL 574119, at *2 (E.D. Tenn. July 19, 1994) (finding "no reason why the United States cannot move to set aside a fraudulent conveyance as its affirmative defense to this quiet title action"). Because Sandra has not

offered any persuasive reason why the Government cannot assert fraudulent conveyance as an affirmative defense, the Court finds that the Government has properly pled the issue as an affirmative defense. Consequently, the Government asserted its claim well within any limitations period cited by Sandra because its answer was filed on July 15, 1993.[4]

Even if a fraudulent conveyance argument could only be asserted as a counterclaim to a quiet title action, the Court would still find that the Government is not barred from asserting its claim. Rule 8(c) of the Federal Rules of Civil Procedure provides that "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." Fed. R. Civ. P. 8(c). "The purpose of Rule 8(c) is to give the opposing party notice of the issue and opportunity to argue his position." *Richmond Steel, Inc. v. Legal & Gen. Assurance Soc'y, Ltd.*, 821 F. Supp. 793, 797 (D. Puerto Rico 1993). In *Richmond Steel*, the court held that the plaintiff

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[4] Because the Court has concluded that the Government's fraudulent conveyance claim was timely asserted within any of the limitations periods at issue, it is unnecessary for the Court to decide the proper limitations period. Nonetheless, the Court concludes that the proper limitations period is the ten year period set forth in 26 U.S.C. § 6502, because "[i]t is well settled that the United States is not bound by state statutes of limitation . . . in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019, 1020, 84 L.Ed. 1283 (1940); *cf. United States v. Peoples Household Furnishings, Inc.*, 75 F.3d 252, 255-57 (6th Cir. 1996) (holding that the United States was not bound by Michigan's statute of limitations for collection of judgments in suit to enforce judgment on loan where the United States was acting in its sovereign capacity).

complied with Rule 8(c) by raising an affirmative defense to a defendant's counterclaim in its amended complaint, even though the affirmative defense should have been asserted by the plaintiff in its answer to the counterclaim, because the defendant had notice of the defense through the amended complaint, the plaintiff's motion for summary judgment, and the proposed pretrial order. *See id.* The Supreme Court applied Rule 8(c) in *Reiter v. Cooper*, 507 U.S. 258, 113 S. Ct. 1213, 122 L. Ed.2d 604 (1993), where, as Sandra alleges here, the defendants asserted counterclaims as defenses. Citing Rule 8(c), the Court stated, "it makes no difference that petitioners may have mistakenly designated their counterclaims as defenses. . . ." *Id.* at 263, 113 S. Ct. at 1217.

In this case, the Government's assertion of its fraudulent conveyance claim in its answer met the requirements of Rule 8(c). Sandra had ample notice of the claim because the Government asserted it as its first affirmative defense to Sandra's complaint. In addition, Sandra was also on notice of the claim because it was raised as an issue in the parties' motions for summary judgment. Therefore, Sandra's argument must be rejected.[5]

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[5] Although the Government has moved to amend its answer to assert its fraudulent conveyance claim as a counterclaim, the Court finds it unnecessary for the Government to do so because its answer serves the purposes of Rule 8(c). On the other hand, even if the Court concluded that the Government is required to amend its answer to assert a counterclaim, the amendment would relate back to its answer and not be barred by the stat[ut]e of limitations. *See Index Fund, Inc.* v. *Hagopian*, 91 F.R.D. 599, 604 (S.D.N.Y. 1981).

Sandra also argues that the Government may not raise the argument that Don's enhancement of the entireties estate while he was insolvent constituted a fraudulent conveyance because the Government did not raise the issue until shortly before trial. The Court rejects this argument. Although the Government did not raise the specific issue in its affirmative defense, the circumstances under which the issue was presented fall squarely within Fed. R. Civ. P. 15(b), which provides in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . .

Fed. R. Civ. P. 15(b); *see also Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1030 (6th Cir. 1992); *Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir. 1982) (noting that an issue raised and argued at trial and upon which evidence was offered was an issue tried by implied consent); *Agricultural Servs. Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1069 (6th Cir. 1977) (finding that failure to amend does not affect resolution of an issue, especially where the opposing party did not object at trial regarding the issue).

Rule 15(b) does not require a formal motion to amend the pleadings. *See* Fed. R. Civ. P. 15(b). "All that is required is that the issue be tried by consent, and consent is generally inferred from a failure to object."

Lavean v. Cowels, 835 F. Supp. 375, 383 (W.D. Mich. 1993). While Sandra objects because the Government did not raise the issue until trial, Sandra did not object to the Government raising the issue until after trial. The issue of whether Don was insolvent at the time he made payments which increased the value of the entireties property was set forth in the Joint Final Pretrial Order. Issues 11 through 13 of the controverted issues set forth in paragraph 3 of the Pretrial Order were whether during 1979 through 1985: (i) Don made fraudulent conveyances into the entireties property; (ii) Don contributed approximately $38,000 into the tenancy by the entireties in property tax and mortgage payments; and (iii) Don was insolvent while he was making contributions for the benefit of the entireties. (*See* Joint Final Pretrial Order ¶ 3.) Sandra did not object to the inclusion of these as controverted issues for trial. Moreover, Sandra's counsel did not object at trial to the Government's evidence regarding the amounts contributed by Don to the entireties property from 1979 to 1985. Such evidence could have been relevant only to the Government's contention that Don's payments into the the [sic] entireties from 1979 through 1985 while he was insolvent were fraudulent. Thus, the Court finds that the issue was tried by the implied consent of the parties.

B. Fraudulent Conveyance

The Government contends that Don's August 28, 1989, conveyance of his interest in the Berwyck Property by quit claim deed for one dollar was a fraudulent conveyance under sections 4 and 7 of the Fraudulent Conveyance Act, M.C.L. §§ 566.14, 566.17. Section 4, which applies to conveyances made by debtors without actual intent to defraud, provides:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

M.C.L. § 566.14. Section 7, which requires proof of actual intent, provides:

> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

M.C.L. § 566.17. Thus, a fraudulent conveyance may be proved either by demonstrating that a conveyance was made by a transferor who was either insolvent at the time or rendered insolvent as a result of the conveyance or that the transferor acted with intent to defraud.

The party seeking to have a conveyance set aside as fraudulent has the burden of producing evidence to support his claim. *See Dean v. Torrence*, 299 Mich. 24, 35, 299 N.W. 793, 797 (1941). Even though transactions between a husband and wife must be closely scrutinized, the party alleging that the conveyance was fraudulent still bears the burden of proof. *See id.*; *Nicholson v. Scott*, 50 F. Supp. 209, 212 (E.D. Mich. 1943). Actual intent to defraud may be shown through "badges of fraud," or "[s]urrounding circumstances which usually accompany an intent to hinder, delay or defraud creditors and from which fraud may be inferred. . . ." *Bentley v. Caille*, 289 Mich. 74, 78, 286 N.W. 163, 164 (1939) (en banc). "Badges of fraud" include lack of consideration, a close relationship between transferor and transferee, pendency or threat of litigation, financial difficulties of the transferor, and retention of possession or control by the transferor. *Coleman-Nichols v. Tixon Corp.*, 203 Mich. App. 645, 660, 513 N.W.2d 441, 449 (1994). Such circumstances are not conclusive evidence of fraud, "but may be strong or weak depending upon their nature and number occurring in the same case." *Id.*

Sandra contends that the Government cannot attack the August 28, 1989, conveyance from Don as a fraudulent conveyance for a number of reasons. The Court will discuss each argument separately.

1. Can the August 28, 1989, Conveyance By Don Of His Interest In Entireties Property To Sandra Be Set Aside As A Fraudulent Conveyance?

Sandra contends that the Government may not attack Don's August 28, 1989, conveyance of his interest in the Berwyck Property to Sandra as fraudulent under the Fraudulent Conveyance Act because a conveyance of property which is exempt from claims of creditors cannot be a fraudulent conveyance under Michigan law. In support of her position, Sandra cites the definition of "assets" under section 1 of the Fraudulent Conveyance Act which provides that "'assets' of a debtor means property not exempt from liability for his debts." M.C.L. § 566.11. Sandra contends that because exempt assets are not considered among a debtor's assets under the Fraudulent Conveyance Act, Don's conveyance of his interest in the Berwyck Property could not be fraudulent. The Government responds that sections 4 and 7 of the Fraudulent Conveyance Act are concerned with a "conveyance" by the debtor without limitation to the debtor's "assets" and that the definition of "assets"

applies solely for the purpose of determining the debtor's insolvency under section 4.

Sandra's argument finds support in numerous cases, decided both before and after Michigan enacted the Fraudulent Conveyance Act, which have consistently held that creditors have no right to complain of a debtor's disposition of exempt property because such property could not be reached to satisfy debts had it remained in the debtor's hands. *See, e.g., Cross v. Commons*, 336 Mich. 665, 669, 59 N.W.2d 41, 43 (1953) (en banc) (holding that the debtor had "the absolute right" to transfer homestead property where the amount of the exemption exceeded his equity in the homestead); *Turner v. Davidson*, 227 Mich. 459, 462, 198 N.W. 886, 887 (1924) (finding that the exchange by the debtor and his wife of one entireties property for another property in the name of the wife was of no concern to creditors because "[t] he uniform rule of this court has been that creditors are not concerned with the disposition which a debtor makes of his exempt property"), *overruled in part by Glazer v. Beer*, 343 Mich. 495, 498-99, 72 N.W.2d 141, 142-43 (1955); *Bresnahan v. Nugent*, 92 Mich. 76, 81, 52 N.W. 735, 736-37 (1892) (observing that "[i]t has been frequently held that a creditor cannot complain of any disposition which a debtor sees fit to make of exempt property"); *Emerson v. Bacon*, 58 Mich. 526, 527, 25 N.W. 503 (1885) (holding that creditors had no right to complain of the debtor's disposition of exempt property); *cf. Baltrusaitis v. Cook*, 174 Mich. App. 180, 185, 435 N.W.2d 417, 419 (1988) (per curiam) (indicating that disclaimer by beneficiary of interest in life insurance proceeds which was exempt from creditors' claims was not a fraudulent conveyance under the Fraudulent

Conveyance Act). Because Don's creditors, including the I.R.S., could not attach Don's interest in the Berwyck Property to satisfy Don's individual debts, *see Craft*, 140 F.3d at 642-43, Don's conveyance of his interest to Sandra could not have constituted a fraud upon his creditors because the property was beyond their reach.

Other cases, without explicitly holding that a spouse's conveyance of an interest in entireties property to the other spouse is not a fraudulent conveyance, support this result. Thus, in *Farrell v. Paulus*, 309 Mich. 441, 15 N.W.2d 700 (1944) (en banc), the court held that the remedy of setting aside a quitclaim deed by a husband to his wife of his interest in entireties property would be ineffective, because it would afford the creditor no relief. The court observed:

> The validity of the quitclaim deed is attacked by plaintiff, but if it were set aside the title would again be in the name of Paulus and wife as tenants by the entirety and plaintiff would not be aided thereby because neither the land nor the rents and profits therefrom would be subject to levy on execution for the sole debt of the husband.

Id. at 445, 15 N.W.2d at 702; *see also Morris v. Wolfe*, 48 Mich. App. 40, 43, 210 N.W.2d 16, 17 (1973) (stating that even if fraud were proven, title to the entireties property would revert to husband and wife and could not be used to satisfy a judgment rendered against only one spouse). Thus, a conveyance cannot be set aside where title would merely revert to husband and wife as tenants by the entireties. Under the facts of this case, title to the Berwyck Property would revert to Don and Sandra as tenants by the entireties and, because Don

predeceased Sandra, sole title would pass to Sandra as the survivor.

The Government cites *Lasich v. Estate of Wickstrom* (*In re Wickstrom*), 113 B.R. 339 (Bankr. W.D. Mich. 1990) as support for its argument that the Court should ignore the so-called "no harm-no foul" rule found in Michigan case law. However, the Court finds *Wickstrom* both factually and legally distinguishable from this case. *Wickstrom* differs on its facts from this case because the conveyances of entireties property in that case were from the debtor and his spouse to the debtor's parents and the debtor's son. *See id.* at 341. While the facts in *Wickstrom* do not materially distinguish the case, the legal issue does. The specific question was whether the bankruptcy trustee could avoid a prepetition transfer of entireties property either as a preference or a fraudulent conveyance pursuant to 11 U.S.C. §§ 547(b) and 548(a). *See id.* at 343. The bankruptcy court rejected the "no harm-no foul" analysis adopted in *Cross* and other Michigan cases because, under the Bankruptcy Code, all property interests of a debtor, including those in entireties property, are included in the bankruptcy estate, whereas such interests were not part of the bankruptcy estate under the Bankruptcy Act of 1898, which governed the court's analysis in *Cross*. *See id.* at 350. Moreover, although the court found that creditors have rights in potentially exempt property, its reasoning was based upon the trustee's right to sell the debtor's interest in entireties property which the debtor fails to exempt. *See id.* at 347. Here, the same considerations do not apply because a bankruptcy trustee is not seeking to recover property under the Bankruptcy Code. Therefore, under Michigan law, the conveyance from

Don to Sandra did not, by itself, constitute a fraudulent conveyance.[6]

Even though the conveyance from Don to Sandra was not fraudulent, the Government may still be entitled to relief. An exception to the "no harm-no foul rule" exists where the debtor, while insolvent, places non-exempt funds beyond the reach of his creditors by enhancing the entireties property. Michigan courts have "consistently held that during insolvency entireties estates cannot be created or enhanced at the expense of creditors and that relief may be granted without reference to any actual fraudulent intent." *Glazer v. Beer*, 343 Mich. 495, 498, 72 N.W.2d 141, 142 (1955) (en banc); *see also La Bour v. Bergin*, 334 Mich. 437, 439, 54 N.W.2d 710, 711 (1952); *Morris*, 48 Mich. App. at 43, 210 N.W.2d at 17. In *McCaslin v. Schouten*, 294 Mich. 180, 292 N.W. 696 (1940) (en banc), the court held that payments made by the debtor while he was insolvent which reduced the balance of his mortgage were fraudulent regardless of actual intent. The court stated:

> Being insolvent at the time and indebted to the bank, in so far as Mr. Schouten invested or used his individual funds to pay the mortgaged debt on the entireties property and thereby placed or attempted to place his individual property beyond the reach of his creditors, the transaction constituted a

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[6] *Ash v. Ash*, 280 Mich. 198, 273 N.W. 446 (1937) (en banc), cited by the Government, only dealt with the question of whether a conveyance of an interest in entireties property by one spouse to the other was procured through fraud. That case does not provide a basis for a creditor of one spouse to attack a conveyance of an entireties interest from one spouse to the other on the basis of fraud.

> fraud in law. Such payment cannot be held proper on the theory that Mr. Schouten was indebted to the mortgagee and had a right to pay that creditor in preference to others. Instead the payment on the mortgage debt was tantamount to an investment of Mr. Schouten's funds in property which he and his wife would hold as tenants by the entireties; and thus he would hinder and possibly prevent his creditors from reaching the funds invested by him. . . .

Id. at 185, 292 N.W. at 699.

The parties have stipulated that Don was insolvent during the period from April 15, 1980 through August 28, 1989, when he was indebted to the I.R.S. for delinquent taxes. In addition, the Government has presented evidence that during this period, Don made property tax and mortgage payments on the Berwyck Property which reduced the principal balance of the mortgage and thereby enhanced the value of the entireties property. Thus, unless otherwise precluded, the Government is entitled to a lien on Don's share of the proceeds of the sale of the Berwyck Property equal to the amount by which the value of the entireties property was enhanced by payments made by Don during the period of insolvency. *See La Bour*, 334 Mich. at 440, 54 N.W.2d at 712.

2. Does Don's Discharge In Bankruptcy Foreclose The Government From Seeking Relief?

Sandra contends that the Government is precluded from asserting a fraudulent conveyance claim because Don's debt was discharged, as was the I.R.S. lien, which the Sixth Circuit has held did not attach to the Berwyck Property. The Government relies on the case

of *Morris v. Wolfe*, 48 Mich. App. 40, 210 N.W.2d 16 (1973), as support for its right to pursue its claim, even after the debt has been discharged in bankruptcy. As Sandra points out, however, *Morris* differs from this case in certain respects. In that case, the plaintiff received a worker's compensation award on January 28, 1963, and a partial summary judgment was entered against the defendant husband in February 1967. An execution on the judgment was issued on December 31, 1969, and notice of levy was recorded on March 4, 1970, against property originally held by the defendants as tenants by the entireties, but which was transferred to the wife when the husband conveyed his interest by quit claim deed on September 23, 1966. The husband then filed a petition in bankruptcy and received a discharge on August 17, 1971. The court held that because the plaintiff was a judgment creditor whose lien had not been affected by the defendant's bankruptcy discharge[7], the plaintiff was not precluded from pursuing fraudulently conveyed property in state court.

> It is fundamental that a discharge in bankruptcy is personal in nature and releases only the bankrupt's personal liability. This discharge affects the underlying debts of secured and unsecured creditors alike but does not dispose of a valid lien not avoided by the bankruptcy act. [F]or this reason, we conclude that a lien creditor may pursue the attached collateral in a state court subsequent to the debtor's discharge in bankruptcy.

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[7] It is unclear from the court's opinion whether the judgment was only against the husband. If that was the case, it seems to this Court that the *Morris* court's conclusion that the lien attached to the entireties property was wrong in light of the Sixth Circuit's holding in this case.

Id. at 45-46, 210 N.W.2d at 18.

Sandra points out that *Morris* does not apply in this case because the Government is not a judgment creditor and its lien did not attach to the Berwyck Property and was therefore discharged. It is true that the *Morris* court drew a distinction between secured and unsecured creditors. *See id.* at 44-45, 210 N.W.2d 16. However, much of the court's discussion was dicta and was also based upon the Bankruptcy Act of 1898, under which fraudulently conveyed property was automatically included in the bankruptcy estate. Although as far as this Court can tell, no Michigan court has addressed the issue, the court in *Dixon v. Bennett*, 72 Md. App. 620, 531 A.2d 1318 (1987), held that a debtor's discharge in bankruptcy did not prevent an unsecured creditor from bringing a subsequent action under the Uniform Fraudulent Conveyance Act. *See id.* at 637-38, 531 A.2d at 1326-27. The court's reasoning explains why *Morris*, to the extent it can be read to preclude claims by unsecured creditors, is incorrect:

> The discharge provision of the Bankruptcy Code, 11 U.S.C. § 524, consistent with fundamental bankruptcy policy, provides the debtor with a fresh start free from the burdens of preexisting liabilities. Under § 524, the discharge only (i) extinguishes personal liability of the debtor; and (ii) prevents creditors whose claims arose pre-bankruptcy from any actions to impose personal liability on the debtor. 11 U.S.C. § 524 (1978). Section 524(e) expressly provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." § 524(e).

Under § 16 of the Bankruptcy Act of 1898, Ch. 541, 30 Stat. 544, 550 (1898), the limitation of discharge provision restricted actions to those against co-debtors, guarantors, or other sureties. The language of § 524(e) of the 1978 Bankruptcy Code reveals a congressional intent to broaden the rights of creditors, by preserving their actions against third parties and their property, and to restrict the effect of a discharge solely to a release of the personal liability of the debtor.

In *Kathy B. Enterprises, Inc. v. United States*, 779 F.2d 1413 (9th Cir. 1986), a debtor fraudulently transferred assets to a third party. The debtor was eventually discharged. Subsequently, the Internal Revenue Service attempted to collect delinquent taxes owed by the debtor by seizing the proceeds the third party was receiving from the sale of the debtor's assets. The I.R.S. claimed that it could collect the taxes in this way because under Illinois law the transfers had been fraudulent. The third party argued that the debtor's discharge barred the I.R.S.'s cause of action. The Court, relying on the change in the statutory language, held that under § 524(e) the I.R.S. could bring a cause of action against a fraudulent transferee despite the debtor/taxpayer's discharge. *Kathy B.*, 779 F.2d at 1415. We agree with the 9th Circuit. In the case sub judice, appellant did not seek to impose personal liability on the debtor but brought her cause of action against the fraudulent transferee. We believe appellant's claim is precisely the type contemplated by the expanded scope of § 524(e).

Id. The holding in *Dixon* has been followed by courts in other states in addressing the same question under those states' versions of the Uniform Fraudulent Conveyance Act. *See Citizens Bank of Mass. v. Callahan*, 38 Mass. App. Ct. 702, 705-06, 653 N.E.2d 600, 602-03; *J.P. Castagna, Inc. v. Castagna*, No. CV 92 0523960, 1995 WL 225473, at *2-3 (Conn. Super. Ct. Apr. 7, 1995) (mem. op.). This Court finds the *Dixon* court's reasoning persuasive and therefore concludes that the Government is not barred from pursuing its claim.

3. Is The Government's Right To Relief Affected By Don's Death?

Sandra argues that Don's death precludes the Government from recovering any of the proceeds of the sale of the Berwyck Property because even if the August 28, 1989, conveyance was set aside, title to the property would revert back to Don and Sandra as tenants by the entireties and, as a result of Don's death, would then go to Sandra as the survivor. While this argument would be applicable if the Court found that the conveyance itself was fraudulent, it does not prevent the Government from recovering the amounts which Don paid to enhance the entireties property while he was insolvent.

4. How Much Is The I.R.S. Entitled To Recover?

The Government asserts that it is entitled to recover all mortgage and property tax payments which Don made from April 15, 1980 through 1985, which enhanced the value of the entireties estate, as well as accretions in Don's share of the net equity, based either upon payments which reduced the mortgage balance or market forces which increased the value of the property. The Government is not seeking to recover

mortgage or property tax payments made after 1985 because those payments were made with Sandra's funds.

The cases cited by the Government do not support its position. The creditors in those cases were allowed to recover only the amount by which value of the equity was increased as a result of payments that somehow put money into the hands of the debtors, either directly or indirectly, and beyond the reach of creditors. For example, in *Dunn v. Minnema*, 323 Mich. 687, 36 N.W.2d 182 (1949) (en banc), the court held that the creditor was entitled to a lien in the amount of $3,305, which represented the total amount of payments on the principal balance of the land contract by the debtor after the date he became insolvent. *See id.* at 696, 36 N.W.2d at 185. In *Glazer*, the court imposed a lien on the entireties property equal to the value of improvements which the debtor used to remodel a barn on the property for use in his business. *See Glazer*, 343 Mich. at 496-97, 72 N.W.2d at 141-42. In *La Bour*, the court awarded the trustee of the defendant's bankruptcy estate a lien in the amount of $2,300, representing payments which the defendant had made to reduce the balance of the mortgage. *See La Bour*, 334 Mich. at 438, 54 N.W.2d at 711. Similarly, in *McCaslin*, the court awarded the creditor a lien in the amount of $5,404, the amount of the defendants' equity in their entireties property. *See McCaslin*, 294 Mich. at 180, 292 N.W. at 700.

To this Court's knowledge, no Michigan court has ever held that the interest component of mortgage payments or property tax payments enhance entireties property to the detriment of creditors. The reason is obvious: such payments do not increase a debtor's

equity or constitute a fraud on creditors. Rather, payments of interest and property taxes are no more than payments made by the debtor to certain creditors in preference over other creditors, which the law allows debtors to do. As anyone who has ever had a thirty-year mortgage can attest, substantial payments in the first several years covering interest, principal, property taxes, and insurance, contribute only slightly in reducing the amount of the debt. Thus, in *Pearce v. Micka*, 62 Md. App. 265, 489 A.2d 48 (1985), the court held "that payment of interest, taxes and insurance premiums did not constitute fraudulent conveyances under the Uniform [Fraudulent Conveyance Act]." *Id.* at 275, 489 A.2d 48. The court in *Pearce* distinguished *McCaslin* on the basis that the payments in "*McCaslin* did not involve monthly mortgage payments which included interest and funds to be escrowed for payment of taxes and insurance premiums."[8] *Id.* at 274, 489 A.2d at 53.

The evidence presented by the Government shows that from 1980 through 1985, Don and Sandra made a total of $19,692 in mortgage payments, which included $12,999 in interest and $6,693 in principal. Thus, during the period in question, payments made using Don's funds reduced the outstanding balance of the mortgage and constituted a fraudulent conveyance in the amount of $6,693. Accordingly, the Government is entitled to $6,693 of the escrowed sales proceeds from the Berwyck Property.

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[8] Likewise, there is no arguable basis for awarding the Government any increase in equity due to the general increase in property values. The value of value of [*sic*] the Berwyck Property would have increased regardless of whether payments were made to reduce the principal balance of the mortgage.

Conclusion

For the foregoing reasons, the Court concludes that the August 28, 1989, conveyance by Don to Sandra of his interest in the Berwyck Property was not a fraudulent conveyance, but that payments made by Don from April 15, 1980 through December 31, 1985, which reduced the principal balance of the mortgage in the amount of $6,693 did constitute a fraudulent conveyance. Therefore, the Government is entitled to recover that amount from the escrowed funds from the sale of the Berwyck Property.

A judgment consistent with these Findings of Fact and Conclusions of Law will be entered.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:93-CV-306

SANDRA L. CRAFT, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ACTING THROUGH
THE INTERNAL REVENUE SERVICE, DEFENDANT

[Filed: Mar. 30, 1999]

JUDGMENT

Before: QUIST, District Judge.

In accordance with the Findings of Fact and Conclusions of Law issued this date,

IT IS HEREBY ORDERED that the United States is awarded $6,693 of the escrowed sales proceeds from the Berwyck Property, plus interest on that amount from October 26, 1995.

IT IS FURTHER ORDERED that the remainder of the escrowed sales proceeds plus interest shall be delivered to the plaintiff.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:93-CV-306

SANDRA L. CRAFT, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ACTING THROUGH
THE INTERNAL REVENUE SERVICE, DEFENDANT

[Filed: Oct. 26, 1995]

OPINION

Before: QUIST, District Judge.

Plaintiff filed this action in an attempt to quiet title to the proceeds from the sale of certain real property. In a prior opinion, this Court held that when Mr. and Mrs. Craft jointly conveyed the property on August 28, 1989, the entireties estate terminated and each spouse took an equal half interest in the estate. The Court must now determine the value of Mr. Craft's interest in the property as of August 28, 1989. The Court held a hearing on September 11, 1995, [1] and subsequently each party submitted a supplemental brief.

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[1] The September 11, 1995, hearing was conducted by telephone.

The parties have stipulated that on August 28, 1989, the Berwyck property had a fair market value of $120,000.00. The parties also agree that on that date the property had an outstanding mortgage balance of $19,412.12. The parties do not, however, agree upon the value of Mr. Craft's interest in the property.

Plaintiff contends that even though the property was not sold in 1989, she should be entitled to deduct the hypothetical transaction costs such as those which were incurred when the property was sold in June of 1992. Plaintiff asserts that Mr. Craft's interest in the property as of August 28, 1989, was $45,682.44.[2] In support of her position, she cites 11 U.S.C. § 506(a) and *In re Claeys*, 81 B.R. 985, 990-91 (Bankr. D.N.D. 1987).

The United States insists that it is entitled to 50% of the net sales proceeds resulting from the June 1992 sale of the property. It argues in the alternative, that if the lien interest is limited to 50% of the value of the property as of August 28, 1989, the United States would be entitled to statutory interest as with a failure to honor levy action under 26 U.S.C. § 6332(d) of the Internal Revenue Code. The United States has attached an exhibit which indicates that the lien interest computed

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[2] Plaintiff's calculation is as follows:

Fair Market Value of real property	$120,000.00
(-) Mortgage balance	19,412.12
(-) Realtor's commission	8,400.00
(-) Survey, termite inspection	215.00
(-) Title insurance	476.00
(-) Transfer tax	132.00
	$ 91,364.88

through June 1, 1992, the month of sale, would total $67,006.85. This amount exceeds the balance of the escrowed fund. Thus, the United States contends that the entire escrowed fund should be awarded to the United States.

This Court is unwilling to accept plaintiff's argument that she be permitted to subtract hypothetical closing costs. Nor is this Court convinced that 26 U.S.C. § 6332(d) is analogous to this fact situation.

Therefore, the Court will determine Mr. Craft's interest in the property as of August 28, 1989, by subtracting the outstanding mortgage from the fair market value of the property and dividing that number by two. This calculation results in the figure $50,293.94.[3] An Order will be entered awarding the United States $50,293.94 of the escrowed sales proceeds. The remainder of the escrowed fund will be released to plaintiff.

FINAL JUDGMENT

In accordance with the Opinion issued on this date,

IT IS HEREBY ORDERED that the United States is awarded $50,293.94 of the escrowed sales proceeds from the Berwyck property.

IT IS FURTHER ORDERED that the remainder of the escrowed fund will be released to the plaintiff.

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[3] Fair Market Value $120,000.00
Outstanding Mortgage - 19,412.12

$100,587.88 ÷ 2 = $50,293.94

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:93-CV-306

SANDRA L. CRAFT, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ACTING THROUGH THE INTERNAL REVENUE SERVICE, DEFENDANT

[Filed: Sept. 12, 1994]

OPINION

Before: QUIST, District Judge.

In this action plaintiff, Sandra L. Craft, seeks to quiet title to proceeds from the sale of certain real property located in Grand Rapids, Michigan. She objects to a lien placed on the property by defendant, the Internal Revenue Service (IRS). This matter is presently before the Court on cross motions for summary judgment.

Background Facts

In May of 1972, plaintiff and her husband, Don R. Craft, purchased the property at issue in this case as tenants by the entireties. Mr. Craft failed to timely file federal income tax returns for taxable years 1979-1987 and as a result, he was assessed $482,446.73 in unpaid tax liabilities. On March 30, 1989, the IRS filed a Notice

of Federal Tax Lien against the property. On August 28, 1989, Don and Sandra Craft quitclaimed their interest in the property to Sandra Craft. Mr. Craft filed a petition for relief under Chapter 7 of the Bankruptcy Code on January 30 1992 and on June 1, 1992, the Bankruptcy Court entered an order of discharge. The bankruptcy case was closed on June 11, 1992.

This lawsuit arose when plaintiff attempted to sell the property and the IRS refused to release its lien. The property was eventually sold and the Crafts entered into an agreement with the IRS whereby one half of the net proceeds of that sale were released to Sandra L. Craft. The balance of the proceeds, amounting to $59,944.10, was retained in escrow pending the outcome of the federal tax lien dispute. The IRS contends that it is entitled to one half of the net proceeds because its lien attached prior to the sale of the property.[1]

DISCUSSION

Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.

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[1] Because the IRS refused to release the tax lien against the property, Sandra Craft moved to reopen the bankruptcy case of Don Craft and file an adversary proceeding against the IRS to force it to release the lien. Although the bankruptcy case was reopened on October 13, 1991, it was subsequently determined that the bankruptcy court did not have jurisdiction to determine the validity of the lien since the property had never been included in Mr. Craft's bankruptcy estate. A Consent Judgment was entered by the bankruptcy court and the bankruptcy case was closed for the second time on June 1, 1993.

R. Civ. P. 56. The rule requires that the disputed facts be material. Material facts are facts which are defined by substantive law and are necessary to apply the law. A dispute over trivial facts which are not necessary in order to apply the substantive law does not prevent the granting of a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). The rule also requires the dispute to be genuine. A dispute is genuine if a reasonable jury could return judgment for the nonmoving party. *Id.* This standard requires the non-moving party to present more than a scintilla of evidence to defeat the motion. The summary judgment standard mirrors the standard for a directed verdict. The only difference between the two is procedural. Summary judgment is made based on documentary evidence before trial, and directed verdict is made based on evidence submitted at trial. 477 U.S. at 250-51, 106 S. Ct. at 2511.

A moving party who does not have the burden of proof at trial may properly support a motion for summary judgment by showing the court that there is no evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25, 106 S. Ct. 2548, 2553-54 (1986). If the motion is so supported, the party opposing the motion must then demonstrate with "concrete evidence" that there is a genuine issue of material fact for trial. *Id.*; *Frank v. D'Ambrosi*, 4 F.3d 1378, 1384 (6th Cir. 1993). The court must draw all inferences in a light most favorable to the non-moving party, but the court may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Agristor Financial Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992) (quoting *Matsushita Elec. Indus.*

Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

Validity of IRS Lien

In *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971), the Sixth Circuit held that, under Michigan law, tenants by the entirety hold under a single title and that a federal tax lien could not attach to property held by a husband and a wife as tenants by the entirety because the government's tax lien was only against the husband. *Id.* at 1343. In this motion, the IRS challenges the continued validity of the ruling in *Cole v. Cardoza*. The IRS contends that subsequent statutory changes and developing case law have made the holding in *Cole v. Cardoza* obsolete. According to the IRS, each spouse now has a separate property interest in a tenancy by the entirety to which a federal lien may attach.

It is well-established that state law governs the question of whether a taxpayer has an interest in property. However, once it has been determined that state law creates a property interest, federal law controls the attachment of a federal tax lien to that property. *United States v. National Bank of Commerce*, 472 U.S. 713, 722, 105 S. Ct. 2919, 2925 (1985); *United States v. Rodgers*, 461 U.S. 677, 103 S. Ct. 2132 (1983); *Aquilino v. United States*, 363 U.S. 509, 513-14, 80 S. Ct. 1277, 1280 (1960); *United States v. Bess*, 357 U.S. 51, 55, 78 S. Ct. 1054, 1057 (1958).

In 1975 the Michigan legislature enacted Public Act No. 288. The legislation was an attempt to equalize women's rights in property held as tenants by the entirety. The Act provides that "[a] husband and wife shall be equally entitled to the rents, products, income, or profits, and to the control and management of real or

personal property held by them as tenants by the entirety." M.C.L.A. 557.71; M.S.A. 26.210(1). The statute became effective December 10, 1975.

Subsequent to this legislation, the Sixth Circuit decided *United States v. Certain Real Property at 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990) *cert. denied sub. nom. Marks v. U.S.*, 499 U.S. 947, 111 S. Ct. 1414 (1991) (*Leroy Lane I*), which concerned the rights of tenants by the entirety in real property the government seized and sold under drug forfeiture proceedings. The Sixth Circuit held that the interest acquired by the government was most analogous to the position of a judgment creditor of one spouse under Michigan law. The court observed as follows:

> The exact nature of the parties' rights would be more readily determinable if the real property here had not been sold. Mrs. Marks would be entitled to live in the house during the duration of the tenancy, and the Government would have a lien on the property to the extent of the value of Mr. Mark's interest which *would prevent Mrs. Marks from obtaining the entire proceeds upon the sale of the property*.
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> * * *
>
> [A]lthough Michigan law precludes a forced sale of property to enforce a judgment lien, we have found no cases which would preclude the attachment of a creditor's lien on one spouse's interest which could be satisfied to the extent of that spouse's interest upon the termination of the entireties estate.

Id. at 351-352 (emphasis added).

Two years later, in *United States v. Certain Real Property Located at 2525 Leroy Lane*, 972 F.2d 136 (6th Cir. 1992) (*Leroy Lane II*), the Sixth Circuit restated its *Leroy Lane I* holding as follows: "the government was precluded from obtaining the husband's interest in the property unless [the wife] predeceased her husband *or* unless the entireties estate was otherwise terminated by divorce or *joint conveyance* in accordance with Michigan law." *Leroy Lane II*, 972 F.2d at 137 (emphasis added).

In *Fischre v. United States*, 852 F. Supp. 628 (W.D. Mich. 1994), the District Court for the Western District of Michigan held that judgment lien based upon the sole obligation of one spouse may attach to that spouse's individual survivorship interest in entireties property. In *Fischre*, the plaintiffs, who owned real property as tenants by the entirety, sought to remove a cloud on their title caused by an abstract of a judgment that the United States had obtained against Dr. Fischre individually. Plaintiffs argued that the United States' lien could not attach to Fischre's interest in the property without illegitimately encumbering the property interest of his wife. The court held that the abstract of judgment was void as it pertained to the plaintiffs' present title as tenants by the entirety. However, the abstract of judgment did attach to Dr. Fischre's *individual* survivorship interest in the property and was subject to enforcement upon termination of the entireties estate, whether that occurred by the prior death of Mrs. Fischre, divorce, or joint conveyance. As the *Fischre* court explained, this conclusion does not require a rejection of *Cole v. Cardoza*, but rather a focus on each spouse's potential survivorship interest.

> [E]ven though each spouse has an indivisible interest in the entireties property and owns it as a whole, each also holds an individual interest . . . . This individual interest is not realized and remains inchoate until the entireties estate is terminated by the death of one spouse, divorce or joint conveyance . . . . As long as the entireties estate is intact, the property is not subject to levy and execution by the creditors of one spouse. Yet, each spouse's survivorship interest is distinct, cognizable, and sufficient to support attachment of a creditor's lien.

Id. at 630 (citing *Leroy Lane I*).

In the instant case, plaintiff and Mr. Craft originally held the real property at issue as tenants in the entireties and then made a joint conveyance of the property to Mrs. Craft. At the time that the joint conveyance was made, the entireties estate terminated. At that point, each spouse took an equal half interest in the estate and the government's lien attached to Mr. Craft's interest.

CONCLUSION

For the reasons set forth above, plaintiff's motion for summary judgment is DENIED and defendant's motion for summary judgment is GRANTED. An Order consistent with this Opinion will be entered.